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Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1994

JERRY LOWERY,

Petitioner,

v.

T. E. REDD, individually and in his official capacity as a police officer; LARRY STOVALL, individually and in his official capacity as a police officer; J. V. SIMMONS, individually and in his official capacity as a police officer; and CITY OF SOUTH BOSTON, VIRGINIA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT
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Respondents and cross-petitioners, T. E. Redd ("Redd"), Larry Stovall ("Stovall"), J. V. Simmons ("Chief Simmons") and the City of South Boston, Virginia ("the City") (collectively "the defendants") respectfully request

that this Court deny the Petition of Jerry Lowery ("Lowery") seeking a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case. The defendants further petition the Court to issue a Writ of Certiorari to review the Fourth Circuit's determination that Redd and Stovall are not entitled to qualified immunity.

OPINION BELOW

The opinion of the Fourth Circuit below is Lowery v. T. E. Redd, et. al., docket number 92-2450, unpublished.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §1254(1). The opinion and judgment of the Fourth Circuit were entered December 21, 1993. The Fourth Circuit denied Lowery's Petition for Rehearing and Suggestion for Rehearing en banc on January 20, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURT PROCEEDINGS AND DISPOSITION BELOW.

Lowery filed an action against Redd, Stovall, Chief Simmons and the City alleging, inter alia, violations of 42 U.S.C. §1983 and 1985.

After limited discovery, the defendants moved for summary judgment on the grounds of qualified immunity. The United States District Court for the Western District of Virginia granted the motion as to Chief Simmons and the City.

The District Court denied summary judgment as to Redd and Stovall. The Court held that "Mr. Stovall failed to meet his burden of showing that there is no genuine issue of material fact as to Lowery's §1983 and 1985 claims against him." As to Redd, the Court also denied the motion, but agreed to reconsider his claim after his deposition is taken.

The United States Court of Appeals for the Fourth Circuit in an unpublished, per curiam, opinion, affirmed the District Court's decision in all respects.

B. STATEMENT OF FACTS.

1. Undisputed Facts.

The City consists of five square miles and, as of February 1, 1991, the City employed a police chief and fifteen officers. For the normal evening shift (twelve midnight to eight o'clock a.m.), three officers were on patrol duty, including an officer in charge. (App. at 1a-2a and 6a-7a).

On Thursday evening, January 31, 1991, Stovall and Redd reported for duty thirty minutes before the midnight shift. At approximately one o'clock a.m., Redd saw a sedan on Dogwood Drive in the western part of the City.[1] Traffic is normally light on Thursday nights at one o'clock a.m. because local factories have already changed shifts. (App. at 1a-2a and 15a).

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[1]A reference map is provided at App. 131a.

Dogwood drive is a dead-end street in the direction the vehicle was proceeding. As it crossed Watkins Avenue, the vehicle turned off its lights. Redd attempted to follow the vehicle but it eluded him by proceeding to the rear of the Burton Construction Company, a private business, which was not open at one o'clock a.m. (App. at 2a and 15a).

Redd and Stovall later located the vehicle proceeding west on Webster Street. The vehicle stopped at an unlighted house and the driver walked to the front porch. Stovall saw the driver on the front porch, but Stovall remained in his vehicle while Redd approached Lowery and asked why he had been behind Burton's. Lowery responded that he was from Richmond and he was lost. (App. at 2a and 17a-18a).

Redd advised officers White and Stovall of the information provided by the vehicle's driver and Redd then

learned from the dispatcher that the vehicle was from Richmond and that the owner of the vehicle had a suspended license. When Redd next looked for the vehicle it had disappeared, but he saw it again crossing Wilborne Avenue, heading west on Chalmers. The vehicle made several additional turns. When he got behind the vehicle, Redd turned on his flashing blue lights. The vehicle turned into the parking lot of the Willow Oaks Apartments and stopped. (App. at 3a and 33a-35a).

Redd approached the driver's side of Lowery's vehicle and asked for his driver's license. Lowery got out of the car and gave Redd the license. Redd called the dispatcher and confirmed that it was suspended. (App. at 3a and 42a).

2. Redd and Stovall's Version.

According to Redd and Stovall, when Redd told plaintiff that his license was suspended, Lowery

became agitated and began swearing, demanding to know why. Redd invited Lowery to sit in the police vehicle so he could write the summons and make calls to the dispatcher to find out why the license was suspended. During this time, a female occupant of Lowery's vehicle opened the passenger door and ran toward the apartments carrying a brown paper bag. (App. at 4a and 42a).

In Redd's vehicle, Lowery sat in the front passenger's seat, but began to act in an agitated and loud manner. He got out of the vehicle, then got back in and continued to use profanity. Redd requested that Stovall come to the vehicle and sit in the rear seat; Stovall did so. (App. at 3a-4a and 45a).

While in the vehicle, Redd observed Lowery fumbling with his pockets. Redd inquired about what he was doing and Lowery, suddenly and without warning, withdrew his hand containing a shiny object. Neither

officer could see the object well because the squad car was lit by only the dome light. Lowery then launched himself onto Redd, stabbing at him repeatedly with the weapon held in his right hand. Lowery pinned Redd against the seat and driver's side door and slashed him across the face and neck. Redd yelled, "knife!". (App. at 4a, 12a, 50a, 60a-73a).

Stovall, who was seated in the back seat, reached over the front seat with both hands and tried to pull Lowery off Redd by grabbing Lowery's shoulders. Stovall saw blood on Redd's face. Lowery exhibited unusual strength while pinning Redd and continuing to slash at him. Stovall then hit Lowery at the base of his skull with his right hand, however, the blow did not deter Lowery. (Id.).

Lowery immediately got on his knees on the front seat and turned toward the back seat with his right hand, containing the weapon, raised. Lowery started to attack Stovall. As Lowery's right hand was coming down toward

him, Stovall blocked it with his left forearm, unsnapped his revolver and fired. Stovall attempted to hit Lowery's shoulder but Lowery dropped and the bullet struck him in the left temple. Lowery slumped in the front seat. The officers immediately radioed for an ambulance and other emergency assistance. While awaiting emergency help, Lowery was removed from the car, but attempted to crawl into the police car and reached for Redd's shotgun which Redd kept in a bracket under the front seat. (App. at 60a-79a).

Following the attack, Redd and Stovall located the weapon in the police vehicle. The weapon turned out not to be a knife, but rather a key holder with two parallel, aluminum, magnetic edges on the bottom. Instead of keys, the key holder contained two packets of cocaine. (App. at 4a-5a).

In the history of the City there has never been a complaint of excessive force or of discharging a firearm. Neither Stovall nor Redd has been involved in any prior incidents involving the use of a firearm or excessive force. (App. at 5a and 100a).

Stovall and Redd attended the standard thirteen week academy training before the City hired them. They also attended annual refresher training courses. (App. at 5a, 129a-130a).

At the time of the incident, Stovall and Redd did not know and had never heard of Lowery. Before he attacked them, Stovall and Redd did not intend to harm Lowery. Stovall used his service revolver in self-defense, believing Lowery presented a serious and immediate threat of personal harm to both Redd and himself. Lowery had attacked and injured Redd with the weapon, which Redd identified by shouting "knife!"; Lowery had been

unresponsive to physical restraint and he was attacking Officer Stovall. (App. at 5a, 18a and 60a-75a).

3. Plaintiff's Version.

Although Lowery received serious injuries which allegedly affected his memory and recollection of events,[2] he claims that he can recall a few specific items.

Lowery denies having any passengers in his vehicle on the night in question. Additionally, he claims that at the instant of the shooting he was standing outside of Redd's car, extending his hands to show Redd that he had nothing in his pockets. According to Lowery, Stovall leaped from the rear of the vehicle and inexplicably "charged him" and shot him in the side of the head from an arm's length. Lowery maintains that he was "unarmed and did not strike

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[2]Lowery claims his injuries were so severe, in fact, that in his responses to Interrogatories he stated that he could not recall his drug or criminal history, including his five prior felony convictions.

or attempt to strike either of the officers before the shooting". Lowery remembers that he fell down on one knee and that Redd and Stovall prevented him from entering the car. At that time, according to Lowery, he scratched Redd's face with his fingernail thus accounting for the wound on Redd's left cheek. (App. at 108a-112a).

C. REASONS FOR DENYING PLAINTIFF'S PETITION FOR A WRIT.

Lowery's Petition should be denied for the following reasons:

1. The District Court exhaustively addressed the law of City of Canton v. Harris, and Lowery's contention that the Courts below overlooked this case is incorrect.

2. The Fourth Circuit's decision does not conflict with Walker v. City of New York. Plaintiff's assertion that this Court must rule on a conflict between two Circuits is erroneous.

3. There has been no showing of deliberate indifference to Lowery's constitutional rights.

I. THE DISTRICT COURT ADEQUATELY ADDRESSED CITY OF CANTON v. HARRIS.

In this case the District Court Stated:

> There is no evidence that the defendant's made a "deliberate" or "conscious" choice not to train the police officers in this respect, knowing that their failure to do so would "likely . . . result in the violation of constitutional rights." (Citation omitted). Given Lowery's version of the facts, no amount of training could have prevented the unprovoked shooting of Lowery by Officer Stovall. Therefore, I grant the City of South Boston's Motion for Summary Judgment on the Section 1983 claim.
>
> In order for Lowery to hold Chief Simmons liable under Section 1983, he has to show the same degree of culpability as Lowery has to show for the City of South Boston, i.e. "deliberate indifference" to the plaintiff's constitutional rights. (Quoting Harris). The Fourth Circuit has held that liability can be established only when a defendant is personally involved in the unconstitutional conduct. Moreover, the Fourth Circuit has

held that in order to hold a supervisor liable, the supervisor must have known of the need for him to act to put a halt to the alleged unconstitutional conduct or conditions. (Citations omitted).

Even if Lowery was able to show that an individual officer violated his "constitutional right on one occasion, that is not sufficient to raise an issue of fact whether adequate training and procedures were provided." (Citations omitted). . . All the City of South Boston police officers receive their basic training at Virginia Criminal Justice Academy in Lynchburg, Virginia. In addition to basic training, officers receive annual in-service training given or sponsored by the Academy.

Lowery relies on the affidavit of his police expert, D. P. Van Blaricom, to show the various deficiencies in the South Boston police department, including, but not limited to, the following: (1) no ongoing training provided on use of force after basic training, and (2) no training in the use-of-force decisions by the United States Supreme Court. Unfortunately these deficiencies do not rise to the stringent requirement as set forth by the Supreme Court in Harris. Therefore, I must grant Police Chief Simmons' Motion for Summary Judgment on the Section 1983 claim.

How Lowery can claim that the District Court did not address City of Canton v. Harris, is a mystery. The District Court devoted a substantial portion of its opinion to analyzing the conduct of the City and Chief Simmons under the guidelines enumerated in Harris. After evaluating the conduct of the City and Chief Simmons in light of those standards, the District Court held that there could be no finding of deliberate indifference. On review, the Fourth Circuit held:

> On the other hand, because Lowery had not proffered facts from which a reasonable trier of fact could find Chief Simmons or the City liable, the Court granted them Summary Judgment . . . we have considered the briefs and arguments of the parties, and we affirm the judgment of the District Court for the reasons stated in its Memorandum Opinion.

The Fourth Circuit upheld in all respects the decision of the District Court which thoroughly analyzed the facts under the Harris standards. Lowery's argument

that the Courts have not addressed Harris cannot support a petition to grant certiorari.

II. THE DECISION IN THIS CASE IS NOT IN CONFLICT WITH WALKER v. CITY OF NEW YORK.

In Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), the Second Circuit applied this Court's Harris analysis. The Second Circuit fashioned a three prong test to determine whether a municipality's actions can fairly be characterized as "deliberate indifference". The Walker test requires nothing more and nothing less than the standards delineated in Harris.

The Walker Court required a plaintiff to prove: (1) that policymakers know "to a moral certainty" that employees will face a given situation; (2) that the situation either presents a difficult choice or that there is a history of employees mishandling the situation; and (3) that the wrong

choice will frequently cause the deprivation of constitutional rights. Id. at 297-98.

The Second Circuit stated plainly in its opinion that it developed this test by examining the standards and examples set forth in Harris. Contrary to Lowery's argument, Walker merely developed a formula for applying the Harris standards.

Since the Harris decision, the Fourth Circuit has applied its standards faithfully, see e.g. Gordon v. Kidd, 971 F.2d 1087, 1097 (4th Cir. 1992). Lowery's attempt to raise Walker as a reason for this Court to hear his case must be seen for what it is: a desperate attempt to save a portion of his case that under the law of Harris, must fail.

In the instant case the Fourth Circuit merely adopted the District Court's ruling. The District Court, as observed above, scrutinized the facts of this case in light of Harris.

III. THERE CAN BE NO FINDING OF DELIBERATE INDIFFERENCE ON THE PART OF THE CITY OR CHIEF SIMMONS.

A critical prerequisite to liability on the part of the City and Chief Simmons is the finding that Redd and Stovall actually violated Lowery's constitutional rights. See Witt v. Harbour, 508 F.Supp. 378, 379 (W.D.Va. 1980). If Redd and Stovall did not violate Lowery's constitutional rights, there is no basis for imposing liability on the City or Chief Simmons. Assuming arguendo that plaintiff's constitutional rights were violated, the City and Chief Simmons can be held liable only if they acted with "deliberate indifference" to the rights of potential victims in their training and supervision of Stovall and Redd. City of Canton v. Harris, 489 U.S.378 (1989).

This Court developed a stringent test for lower courts to apply in determining municipal liability: the

plaintiff must allege and prove that a municipal governing body had an inadequate training policy for its police officers for which "the need for more or different training was so obvious and the inadequacy was so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." Harris, 489 U.S. at 389.

Moreover, this Court held that a municipality's failure to train or supervise must be "closely related to the ultimate injury", to the extent that the "injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." Id. According to this Court, it does not "suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." Id. at 391.

In seeking to impose liability on the City and Chief Simmons, Lowery manipulates the factual versions under consideration. In urging a denial of qualified immunity before the Fourth Circuit, Lowery focused on his own version of what occurred. In making his argument against the City and Chief Simmons, Lowery deals exclusively with the facts as described by the defendants. In this respect, it is important to note that Lowery's version of the facts borders on premeditated attempted homicide. According to Lowery, at no time did he act in a cursing, agitated or disruptive manner. He was simply standing outside the police vehicle with his hands extended showing Officer Redd the contents of his pockets in an unprovocative manner when suddenly, without warning, Officer Stovall jumped out the rear seat, charged Lowery from the side and shot him in the head at close range.

As the District Court properly observed:

> There is no evidence that the defendants made a "deliberate" or "conscious" choice not to train the police officers in this respect, and knowing that their failure to do so would "likely . . . result in the violation of constitutional rights." Given Lowery's version of the facts, no amount of training could have prevented the unprovoked shooting of Lowery by Officer Stovall.

This was the first shooting incident in the history of the South Boston Police Department. Therefore, even if Lowery is able to show that an individual officer violated his "constitutional rights on one occasion, that is not sufficient to raise an issue of fact of whether adequate training and procedures were provided." Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (Quoting McClelland v. Facteau, 610 F.2d 693, 697) (10th Cir. 1979), cert. denied, 450 U.S. 929 (1981). Lowery emphasizes what the City and Chief Simmons might have done to prevent the shooting. However, Harris does not

stand for the proposition that in order to avoid summary judgment a plaintiff, by hindsight, need only invent some new method a police department could have adopted.

Not one of Lowery's allegations regarding training or supervision rises to the level of "deliberate indifference". In establishing an exacting standard for imposing liability on a municipality, this Court in Harris was mindful that a lesser standard would open municipalities to unprecedented liability under Section 1983. The law does not invite nor require Federal Courts to "second guess" the hiring and training procedures of municipal employees. This is an "exercise [the Federal Courts] are ill-suited to undertake, as well as one that would implicate serious questions of federalism." Harris at 392.

REASON TO GRANT DEFENDANTS' WRIT

1. The Fourth Circuit has made the status of qualified immunity unclear by its decisions in Gooden v.

Howard County, Maryland, 954 F.2d 960 (4th Cir. 1992), and Rainey v. Connerly, 973 F.2d 321 (4th Cir. 1992).

I. THE FOURTH CIRCUIT HAS MADE THE STATUS OF QUALIFIED IMMUNITY UNCLEAR.

In 1967, this Court ruled that by enacting 42 U.S.C. Section 1983, Congress did not destroy common law immunities traditionally accorded government officials. The Court permitted a police officer to raise the common law defenses of good faith and probable cause. Pierson v. Ray, 386 U.S. 547 (1967).

Over the next several years, this Court extended the qualified immunity defense and provided standards against which an official's conduct could be measured. These refinements contained both an objective and a subjective component. The objective prong (whether an official's conduct violated a constitutional right) provided little

difficulty for the lower courts and was usually resolved by Motion for Summary Judgment. See e.g., Wood v. Strickland, 420 U.S. 308, rehearing denied 421 U.S. 921 (1975); Pierson at 557; Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978), cert. denied, 439 U.S. 912.

The subjective prong of the test proved far more problematic. Whether an official acted with the requisite malicious intent was a question of fact which normally could be resolved only by trial. Moreover, in order to satisfy this objective prong, plaintiffs merely had to allege malicious intent. Requiring an official to endure a trial before determining the validity of his defense, however, defeated one of the principal purposes of the qualified immunity doctrine -- to shield public officials from the rigors, uncertainties, emotions and costs attendant to litigation. This Court noted that plaintiffs abused the subjective prong in order to avoid the qualified immunity

defense. Consequently, the Court encouraged lower courts to dismiss lawsuits whenever appropriate by granting summary judgment for public officials based on the qualified immunity defense. However, with the subjective prong still in place, such an admonition was still difficult to apply. See Butz v. Economou, 438 U.S. 478 (1978). Finally, this Court provided a reformulated standard based on the test of "objective reasonableness". See Harlow v. Fitzgerald, 457 U.S. 800 (1982); Davis v. Scherer, 468 U.S. 183 (1984).

This Court further proclaimed that the qualified immunity defense shall have broad application to protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335 (1986).

In Graham v. Conner, 490 U.S. 386 (1989), this Court dealt specifically with the analysis to be followed by Courts in determining whether a given application of force

is unconstitutionally excessive. The Court stated that the reasonableness of force must be judged from the perspective of a reasonable officer on the scene, not with the luxury of judicial hindsight. The Court emphasized that police officers are forced to make split-second judgments about the amount of force necessary in a particular situation. Id.; see also Tennessee v. Garner, 471 U.S.1 (1985).

In a 1991 Fourth Circuit case, former Justice Powell, sitting by designation, reversed a trial judge and granted qualified immunity in an excessive force claim under Section 1983. Justice Powell affirmed that the question of qualified immunity should be determined well in advance of submission of the facts to a jury. If a reasonable officer could have believed that the plaintiff presented a serious threat of personal harm at the time of the shooting, then as a matter of law, the officer is entitled

to qualified immunity. Flattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991), quoting Tarantino v. Baker, 825 F.2d 722 (4th Cir. 1987).

In early 1992, the Fourth Circuit, en banc, decided Gooden v. Howard County, Maryland, 954 F.2d 960 (4th Cir. 1992), which comprehensively addressed summary judgment on the ground of qualified immunity. In Gooden, the district court denied qualified immunity and the Fourth Circuit upheld the decision by a divided panel. When the court sat en banc it reversed, granting qualified immunity.

Gooden presented a complex fact situation with at least three conflicting versions of the critical facts. The district judge, a majority of the initial panel and the five dissenters held that because of these genuine issues of material fact, summary judgment on the basis of qualified immunity is inappropriate. In words adopted from the trial judge:

> If there was ever a case that cried for trial, this is it . . . . On the face of everything I have read and everything I have heard, this is what juries are for.

Gooden at 970.

The majority holding in Gooden, however, was clear and unequivocal: to determine whether qualified immunity should be granted, the test is one of objective reasonableness. The express purpose of this standard is to accord police officers latitude in exercising what are inescapably discretionary functions replete with judgment calls. Gooden, at 964.

In Gooden, the Fourth Circuit held: qualified immunity is to be considered with due respect for the perspective of the police officers on the scene and not with the greater leisure and acquired wisdom of judicial hindsight. Id. at 965. In determining whether the three

versions should have been sorted out by an appropriate fact finder, the Fourth Circuit plainly stated:

> We think such a view misconceives the basic purpose of qualified immunity which is to spare individual officers the burdens and uncertainties of standing trial in those instances where their conduct would strike an objective observer as following within their range of reasonable judgment.

Id. (citation omitted).

Moreover, in criticizing the claim by the dissenters that questions of credibility cannot be decided by summary judgment, the majority stated that it will always be the case that witnesses to a crime differ over what occurred. What matters, according to the majority, is whether the officers acted in an objectively reasonable manner in light of the exigent circumstances they faced. Id. at 965. Moreover, the objective reasonableness standard is not limited to cases in which the officers make mistakes. Id.

The majority in Gooden could not have been more clear in rejecting the notion that standard Rule 56 consideration should be followed in cases involving qualified immunity. According to the Fourth Circuit, the existence of disputed issues of fact does not preclude summary judgment. Footnote 1 from Gooden is instructive:

> To make a credibility contest out of this incident is to make a credibility contest out of limitless police-citizen encounters, because the dissent's view of the disutility of summary judgment has no apparent cut-off point. Despite a nod or two in the direction of the difficulties of police work, the dissent never attempts to explain what meaningful limits the qualified immunity defense imposes upon its view that summary judgment should be sparingly granted to law enforcement officials. Id. at 966, note 1.

Following Gooden, in August, 1992, a panel of the Fourth Circuit upheld a district court's refusal to grant qualified immunity. Rainey v. Connerly. The Rainey

Court held that questions of excessive force had to be resolved by the trier of fact "in order to reach a decision on the applicability of qualified immunity." Because they were disputed issues of fact, the panel held that an assessment of credibility was essential and summary judgment was inappropriate. Rainey at 323.

In attempting to distinguish Gooden, the panel retreated from the strong statements the court had set forth. Describing Gooden, the Rainey panel merely observed that Gooden did not present any facts that required resolution by a trier of fact. The Rainey Court described Gooden, in simple terms, as a case where "resolution of what actually happened was irrelevant" to the qualified immunity issue, but "in this case [Rainey] a determination of what actually happened is absolutely necessary" before the Court can determine the issue of qualified immunity.

In the instant case, both the District Court and the Fourth Circuit felt constrained because Lowery made certain bare allegations and set forth a version of minimal, but different, facts. Despite the injury which rendered plaintiff unable to recall anything about his past, he was able to relate a few events with startling clarity. As a result of these alleged facts the trial judge felt that the Rainey decision required him to accept plaintiff's version of the events of February 1, 1991, until a trial could be held to determine the operable facts. The District Court emphasized that Rainey was the last word from the Fourth Circuit and specifically held that Rainey required that all credibility issues be determined by a fact finder before qualified immunity may be considered. Stated differently, if credibility is an issue, a case must be submitted to a finder of fact; only then can the Court focus on the question of qualified immunity.

Redd and Stovall respectfully submit that the District Court and the Fourth Circuit erred in this determination. If those courts are correct then the notion of resolving issues of qualified immunity at the earliest possible juncture is obsolete because whenever witnesses to a crime differ qualified immunity will be unavailable. As noted in Gooden, there will always be credibility contests stemming from police/citizen encounters. If the District Court and Fourth Circuit decisions are upheld, summary judgment will almost never be available on qualified immunity grounds. The requirement that there must be a trial before consideration of qualified immunity, eviscerates the rationale for qualified immunity and ignores the evolution of the qualified immunity defense in the Supreme Court commencing with Pierson v. Ray and continuing through Hunter v. Bryant, 112 S.Ct. 534 (1991).

CONCLUSION

For the reasons stated above, defendants respectfully request this Court to deny Lowery's Petition for a Writ of Certiorari and grant Redd and Stovall's Petition for a Writ of Certiorari.

Respectfully submitted,

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Respondent/Cross-
Petitioner

CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested original and forty (40) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States, and mailed three (3) copies to counsel of record for the Respondents, Rodney Sager, 4906 Fitzhugh Avenue, Suite 200, Richmond, Virginia 23219 and Gerald T. Zerkin, 2nd and Franklin Streets, Suite 505, Richmond, Virginia 23219 on May 20, 1994.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JERRY LOWERY,

Plaintiff,

v. Civil Action No.: 92-CV-0004-D

CITY OF SOUTH BOSTON, VA, et al.,

Defendants.

AFFIDAVIT OF T. E. REDD

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths in the Commonwealth of Virginia, T.E. Redd, who, after first being duly sworn, deposes and says:

1. On February 1, 1991, I was employed by the City of South Boston as a police officer.

2. On February 1, 1991, I worked with the 12:00 a.m. to 8:00 a.m. shift. Officers Stovall and White also worked this shift.

3. At approximately 1:00 in the morning, I saw

a Sedan moving on Dogwood Drive. Dogwood Drive is a dead-end in the direction the Sedan was moving. The Sedan crossed Watkins Avenue and turned off its lights. I became suspicious at this point because at this time in the morning traffic is very light and local factories have already completed the turnover for the evening shift.

4. I attempted to follow the car, but I lost it when it went to the rear of Burton Construction Company. Burton Construction Company is a private business that is not open at 1:00 in the morning.

5. I caught up with the car again as it was headed East on Webster Street. The driver got out and went to the front porch. I got out of my police car and asked the driver why he was behind Burton Construction Company. He said he was lost, but now had directions. I told the other officers that the driver of the car said he was lost.

6. I called in the license plate number of the car to the dispatcher who told me that the car was from Richmond and that the owner had a suspended license.

7. By the time I found out about the suspended license the car had left Webster Street. I tried to find the car so I could find out if the driver was the owner of the car and whether he was driving with a suspended license.

8. I caught up with the car as it was crossing Wilburn Avenue heading West of Chalmers Street. The car made other turns and I turned on my blue lights. The car turned into the Willow Oaks Apartments. I approached the driver and asked for his license. I called it in and found that it was suspended.

9. Jerry Lowery, the driver, started cussing and demanded to know why his license was suspended. I asked him to come to my police car while I wrote a summons and found out why the license was suspended. Lowery agreed

to come to my police car. He was very agitated. He kept getting in and out of the car and continued to cuss. I asked Stovall to get into the back seat of my police car to help watch Lowery.

10. Lowery kept fumbling with his pockets. When I asked him about what was in his pockets, he withdrew an object, leaped on me and slashed me across the face and neck with his weapon. I felt something warm on my face which I assumed was blood. I hollered "knife", "knife".

11. Lowery pushed me back and against the driver's door. He was strong and I could push him off. Lowery turned on Stovall with this weapon, and I heard a shot.

12. Lowery slumped over in the seat and I called the dispatcher to get the dispatcher to call the rescue squad.

13. Following the attack, the weapon was located

and it was a sliding key holder which had two parallel metal magnetic edges on the bottom. It contained two foil packets the contents of which were later analyzed and tested positive for cocaine.

14. I did not know Jerry Lowery before February 1, 1991. I did not intend to harm Lowery. When he attacked me, I thought he had a knife and that Stovall's life and my life were in danger.

15. I was trained at the Police Academy. I have attended annual refresher training courses. No complaints have ever been filed against me as a police officer.

S/S
T. E. Redd

EXCERPTS FROM LARRY J. STOVALL'S DEPOSITION

Q. Did you take any training to be on the drug task force?

A. Not but my regular police training.

Q. Did you regular police training include how to recognize someone that was on drugs?

A. We made the raid. They already knew, had the papers on the people we were going to get, and we knew who we were going to get.

Q. How many shifts at the time of this shooting did South Boston have that you could work on?

A. I beg your pardon?

Q. How many shifts, morning, afternoon, evening, midnight?

A. We got 8:00 to 4:00, 4:00 to 12:00 and a

12:00 to 8:00.

Q. Did you rotate?

A. I had been rotating. But I was on third shift at this time.

Q. Which was third shift?

A. 12:00 to 8:00.

Q. 12:00 midnight to 8:00 in the morning?

A. Yes, it was.

Q. Did you work with a partner or by yourself?

A. It was three of us working that night. All of us in individual cars.

* * * * * *

THE DEPONENT: I do not understand what you're saying.

BY MR. SAGER:

Q. Do not?

A. I don't understand what you're saying.

Q. Well, as an example, do you consider the severity of the crime that the person you're looking at has committed as to whether the person might be dangerous.

A. If I am looking at somebody got a gun in their hand, shot somebody, yes, that's dangerous.

Q. Did Mr. Lowery have a gun that night?

A. At the time of that incident with Mr. Lowery, Officer Redd hollered knife. I looked at Officer Redd after I had tried to subdue Mr. Lowery in other ways that I couldn't get him subdued, I saw the blood come from Officer Redd's face and Mr. Lowery turned on me, came halfway across the seat.

Q. Can we have the pictures?

A. That's when I pulled my weapon and fired because Officer Redd hollered knife.

Q. Did Mr. Lowery have a firearm?

A. No, he did not have a firearm. He had a

weapon in his hand. I did not know what it was. I saw the blood coming from Officer Redd's face.

Q. I'm sorry. You did not know what it was?

A. I did not. But, I saw the blood coming from Officer Redd's face.

Q. Did you know at any time what it was in Mr. Lowery's hand before you fired your gun at his head?

MR. OBRION: What he thought it was or--

MR. SAGER: My question is clear. Did you know--

MR. OBRION: It's not clear to me and I object to it unless I can get a foundation for what you're asking.

MR. SAGER: No. You can object, he can answer and the Judge rules whether it's a question and answer that's admissible. But, this is discovery. I will rephrase it. He's a defendant.

BY MR. SAGER:

Q. You did not now what was in Mr. Lowery's hand until after you had shot him. Is that not correct?

A. I responded to a call that Officer Redd made that it was a knife. He hollered knife twice. And Mr. Lowery came halfway across the seat after me with it in his hand with his hand raised. I did not see nothing but -- when he came across the seat with his hand up like this, I saw something shining in his hand. I caught his hand and I pulled my free arm and I fired.

Q. You caught his hand?

A. Yes. I blocked his hand coming across the seat with me.

Q. With what hand?

A. I caught him with my left hand. I was sitting this way in the back seat directly behind him. He came across the seat with it in his hand. I saw the shiny object,

I blocked it, drew my revolver, and I fired.

Q. You blocked his hand with your left hand?

A. Yes.

Q. At that point was you life in jeopardy?

A. Yes, it was. I thought so.

Q. Did you see what was in his hand when you blocked it with your left hand?

A. If did not look at what was in his hand. I saw Officer Redd's face bleeding, Officer Redd hollered knife.

Q. What side of Officer Redd's face was bleeding?

A. The side right here.

Q. His left side?

A. Yes.

Q. Where were you sitting?

A. I was sitting directly behind Mr. Lowery.

Q. On the passenger side?

A. In the back.

Q. Where was Mr. Redd sitting?

A. He was in the driver.

Q. What lights did you have in the automobile?

* * * * * *

Q. Isn't it true that you did not see what was in Mr. Lowery's hand until after you shot him?

A. I saw a shiny object in Mr. Lowery's hand. Officer Redd had hollered knife.

Q. How long was the object?

A. I do not -- I can't recall how long it was. Only thing I know I saw something shiny coming towards me and I blocked it.

Q. Shiny?

A. Yes.

Q. And you blocked it?

A. Yes, I did.

Q. At that point is there any reason when you pulled your gun you didn't order the subject to freeze?

A. This all happened in about 30 seconds. How you going to holler somebody to freeze in that time?

Q. 30 seconds?

A. It all happened in about 30 seconds, him turning on me, coming across the seat, and I pulled my revolver.

Q. He came across the seat?

A. If this is the back of the seat, most of this part of his body was up on top of the seat coming across the seat.

Q. I want to try to let you show me that. But, I

* * * * * *

MR. OBRION: Now, Rod, I don't think

there is a problem. The automobile which Jerry Lowery was driving and was ultimately involved in this incident I don't think anybody knows was Jerry Lowery's automobile at the time they are observing it. So all I want for clarification is the automobile which was ultimately involved in this incident. When is the first time he saw that, I have no objection.

BY MR. SAGER:

Q. Every time I refer to Jerry Lowery's automobile, I am using it only to describe the car that Jerry Lowery was in that evening. Okay. I don't know as I sit here whose car it is. I don't care at this point. But, I'm going to use that term so we will know we are not talking about he Sam Jones' automobile or Sam Jones' driver of the automobile.

Now the question is, you remember that Jerry Lowery got shot in the head sometime on February 1,

1991, is that right?

A. Yes.

Q. Do you remember about what time that happened?

A. I can't recall the exact time. But, somewhere after 1:00.

Q. After 1:00 a.m.?

A. Yes.

Q. In the morning when it was dark or p.m. in the

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Who was it that made the comment?

A. Officer Redd called it in and said there was a vehicle going down Dogwood Lane.

Q. Is it illegal for a vehicle to go down Dogwood Lane?

A. No, it isn't. But, it is illegal for one to go

down with their lights off.

Q. With their lights off?

A. Yes.

Q. Did you see it going down the road with its lights off?

A. No. At the time I was in Huffmiller Plaza checking buildings. When he called, that's when I went.

Q. When did he call?

A. He called me since I was in charge and advised me there was a vehicle going down Dogwood Lane with the lights off. And he was in the process of going in there to find out what was going on.

Q. Is that normal for him to call you in that type of situation?

A. Yes. If I am in charge, it is.

Q. You were in charge?

A. Yes, I was.

Q. So what happened next?

A. I advised him I was leaving Huffmiller Plaza

* * * * * *

A. We proceeded up Webster Street to catch up with the vehicle. And we finally caught up with the vehicle on the east side of Webster Street which he was on the west -- he went to the east side, crossed over Wilborn, W-i-l-b-o-r-n, Avenue. He stopped at James Coleman's house.

Q. Who did?

A. Mr. Lowery.

Q. And am I correct that to your knowledge none of the police officers knew Jerry Lowery before this shooting.

A. No.

Q. No, I'm not or, no, I am correct?

A. To the best of my knowledge, I don't know.

Q. You don't know?

A. I don't know if any of the other two knew him or not. But, I knew I did not.

Q. You didn't now anything about him?

A. I didn't know anything about him. Never seen him.

Q. Didn't know anything about whether he had three jobs or if he had been in trouble or drinks milk or drinks whiskey or takes pills or anything?

A. He could have walked up to me that night, I wouldn't have known who he was.

Q. Didn't know anything about his reputation?

A. No, I did not.

Q. Now, we were at same point -- what happened next?

A. Officer Redd pulled in behind Mr. Lowery's car, got out and walked up to Mr. Coleman's house and asked Mr. Lowery was he lost.

Q. Where were you?

A. I was sitting in the middle of the street.

Q. Are you a car behind Officer Redd's car?

A. No. I was right almost beside Officer Redd's car. I was observing since I was in charge.

Q. And you were just -- because you were in charge, you were observing?

A. Yes.

Q. Where was the third police officer?

A. He pulled on the -- on the left-hand side of Webster Street.

Q. And --

A. About two car lengths from Mr. Lowery's car.

Q. Now tell me what kind of cars each of you were driving?

A. I was driving a white Chevrolet Caprice.

No. Impala. No, it's Caprice. And Officer Redd was driving a white Impala. Officer White was driving a white Impala.

Q. Impala or Caprice?

* * * * * *

you see Mr. Lowery do anything illegal at that time?

A. Parked on the wrong side of the road. That's the only thing he had done wrong.

Q. Was it a two-way street?

A. Yes, it was.

Q. He had stopped on the wrong side of the road?

A. Yes.

Q. Did anybody give him a ticket for that?

A. No. Officer Redd just walked up to Mr. Coleman's front door where Mr. Lowery was. And I could not hear what they were saying. I was in my vehicle.

They was up on the porch.

Q. And what did you see happen? If you couldn't hear what happened, what was going on?

A. I just saw -- Mr. Lowery stood there a few seconds and then he walked back to his vehicle and Officer Redd came back to the vehicle and said he was lost and he didn't know where he was and he advised him how to get back up to where he was going, wherever he wanted to go.

Q. And did you see anybody in Mr. Lowery's vehicle?

A. There was a subject in the car. But, at the time I didn't know who it was.

Q. Did Mr. Lowery do anything while you were observing to threaten anybody?

* * * * * *

Funeral Home. And at this time that's when Officer Redd ran a 10-27 on -- a 10-28 on Mr. Lowery's license plate.

Q. That's to see who owns the vehicle?

A. Yes. And after it came back to Mr. Lowery, Officer Redd also advised the dispatcher to run a 10-27 on his OL number.

Q. Back up just a minute. To your knowledge, did anybody even know Mr. Lowery's name?

A. Only from what the dispatcher had given back on the tape.

Q. So at the time Officer Redd spoke to him, Officer Redd did not ask and, to your knowledge, for his driver's license at this Coleman house?

A. I don't know. I was in my vehicle.

Q. And no one knew Mr. Lowery's name at that time to your knowledge?

A. No, he did not.

Q. And no one ever asked him his name at that time.

A. I don't know if Officer Redd did or not. I was in my vehicle.

Q. And the report you had was the man appeared to be lost, and I told him, this is what Redd told you, I told him how to find his way out of here?

A. From what he told me, the guy said he was lost. He didn't know where he was. And after that he told me he told the guy how to get back to where he wanted to go. Get back to the main road. And anything else he said I can't remember right off.

Q. You didn't observe anything irregular about his automobile?

A. I beg your pardon?

Q. There was nothing wrong with the way his automobile looked?

A. Not that I could see.

Q. Now you said that the three of you met back

at the, outside a funeral home?

A. The --

Q. Powell's?

A. Powell's Funeral Home is right up on Webster Street approximately 75 yards from the Coleman's house.

Q. Did anyone run a check on Mr. Lowery's automobile license plate or anything else while in front of the Coleman house?

A. I don't -- I can't recall if they did. I know the dispatcher gave us the 27 back while we were sitting at Powell's.

Q. And your recollection is that you phoned in for a 27 while at Powell's?

A. No, we called in on the radio for one.

Q. Well, okay. You wouldn't have called in on the radio at Powell's had someone called in at Coleman's?

A. Well, I can't recall if Officer Redd called in the 28 when he pulled off from the Coleman house or while he was at the Coleman house.

Q. The 28 is license plate?

A. License plate check. Only thing I know is we got the 27 back while we were sitting at Powell's.

Q. The license plate came back as a legitimate license plate?

A. Yes, it did.

Q. To a legitimate automobile?

A. Yes.

Q. Nothing stolen?

A. No.

Q. Nothing expired?

A. No.

Q. Next thing you did, that would all be a 10-27 or 10-28?

A. Which one?

Q. The license plate.

A. The license plate on the vehicle would be a 10-28.

Q. All of that came back normal?

A. Yes.

Q. So while you all were still at Powell's you all decided to run a 10-27?

A. He called a 10-27 in before we got to Powell's I think. I'm not sure. We got the 27 back while we were sitting there.

Q. Now, when you get a 10-28 back, do you get the name of whoever it is that may be the owner of the car and the license log information and whether the car is stolen or not, correct?

A. You get the name, you get the social security number and who the vehicle belongs to and where. You do

not get back if it's stolen. You have to run a 10-29 for that.

Q. At that point did you all run a 10-29?

A. No, we did not.

Q. At that point you didn't know, none of you knew the name of the driver, did you?

A. No, we didn't. Just office -- unless Officer Redd did, because I can't answer for him, which I don't know what he do while he was up on the porch.

Q. Then you did the 10-27 and they sent back the name of the owner of the vehicle: is that right?

A. They sent back Jerry Lowery.

Q. The only thing you can get back on the 10-27 is the name of the owner; isn't that right?

A. They send back the owner's name, his date of birth and everything, and if he is suspended or not.

Q. And so you got some information on whether

or not the license, driver's license of the vehicle's owner, was suspended; is that right? On the 10-27?

A. Repeat that.

Q. You got information on the driver's license, the status of the driver's license of the owner of the vehicle, on a 10-27?

A. The 10-27 we call in came back with Mr. Lowery's name on it. He was suspended.

Q. At that point you still had no idea who Mr. Lowery was?

A. I did not. I cannot speak for Officer Redd.

Q. Well, you were in charge. You have told us that several times.

A. Yes. I was in charge.

Q. You were even observing because you were in charge.

Q. Yes, I was.

Q. Then there was a meeting of all three of you at Powell's place, wasn't there? Was there not?

A. Yes. All three of us met up there at Powell's. No particular reason to have no meeting.

Q. You understand you're under oath today, do you not, sir?

A. Yes, I do.

Q. If there was no particular reason to have a meeting at Powell's between the three of you, why did you have such a meeting?

A. I pulled into Powell's Funeral home in the parking lot, Officer Redd pulled in and Officer White pulled in right behind us.

Q. Did you all drink a Coke, did you --

A. No. We did not drink a Coke.

Q. Discuss social plans or what?

A. No, we did not.

Q. As I understand it, the three of you normally would be in three different parts of South Boston doing your assigned tasks that evening?

A. We would have been if we hadn't been answering a complaint that Officer Redd gave us on him.

Q. Well, the complaint was that Officer Redd saw a car without its lights on?

A. Yes, it was.

Q. Was there anything else to the complaint?

A. Yes. He pulled behind Burton Construction. And Burton Construction is no trespassing after dark. Because a whole lot of things have been stolen from there.

Q. You all checked out Burton Construction, did you not?

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It's now what, 1:00, 2;)0 in the morning?

A. No. Not 1:00 or 2:00 in the morning. It

was after 1:00, but it ain't 2:00.

Q. Between 1:00 and 2:00 a.m. It's in February. It's chilly outside, isn't it?

A. Wasn't that cold.

Q. Not cold in February?

A. It's cold in February. Wasn't that cold that night.

Q. None of you had finished doing your assignments, had you?

A. No, we hadn't. We had until 8:00 the next morning.

Q. Then tell me what you all did when you got outside of Powell's Funeral Home?

A. We sat there and we talked a few minutes. And the dispatcher gave back the 27 saying the subject was suspended.

Q. The subject was suspended?

A. Yes.

Q. Let's correct that. You got from the dispatcher that the owner of the vehicle had a suspended driver's license. Isn't that what you got from the dispatcher?

A. Yes.

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A. I didn't get a chance. Because when Officer White pulled in, got out of the vehicle and walked around and got in between me and Officer Redd, because we were still in our vehicles, that's when the dispatcher gave the 27 back.

Q. That the owner of the other vehicle had a suspended driver's license?

A. Yes.

Q. So then what did you all talk about?

A. Officer Redd said the subject went down

Webster Street, he was going down Webster Street see if he could catch up with the vehicle.

Q. At that point none of you knew the driver was the owner?

A. I cannot say that. You will have to ask Officer Redd.

Q. Well, if you were in charge and you were meeting at Powell's to get a report from Officer Redd, I am sure you asked him, didn't you?

A. I just made a statement a minute ago that I didn't get a chance. Dispatcher gave us the 27 back before we got a chance to get any chance to talk.

Q. At that point were you familiar with any of the guidelines of probable cause --

A. Any time you got a vehicle --

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suspended license. Now, what did Redd say or did you

order him to do anything?

A. I didn't order Officer Redd to do anything. Officer Redd said the vehicle went down Webster Street, he was going to catch up with the vehicle.

Q. Why was he going to do that?

A. You will have to ask Officer Redd that. I don't know.

Q. You didn't ask him?

A. I didn't get a chance.

Q. What did Officer White do?

A. Officer White went behind Officer Redd. I went down and turned on Wilborn Avenue, proceeded south on Wilborn, tried to cut the vehicle off if it came back out on Wilborn.

Q. What reasonable cause or probable cause or any type of cause did you all have to stop the vehicle a second time that night?

A. We had got a 27 back on the vehicle, the subject was suspended.

Q. Who identified the subject driver as the owner?

A. Officer Redd talked with the subject. You have to ask him that question. Ask Officer Redd that.

Q. o three of you participated in stopping Mr.

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might be.

MR. OBRION: Is that a question?

BY MR. SAGER:

Q. Is that correct?

A. There was streets called out over the radio. Officer Redd was behind the vehicle telling me the procedure he was taking trying to catch up with the vehicle and the procedure the vehicle was taking, getting to where we finally got it stopped at Willow Oaks.

Q. I want you to understand my next question and pause for a minute and think about your answer before you give it.

MR. OBRION: Object to your instructing the witness. He will do his bet to answer your question.

BY MR. SAGER:

Q. Did anyone make a statement over the police radio about what was going to be done to the driver of that vehicle when he was caught?

A. No.

Q. Do you recall whether it was you or someone else making a statement similar to the following: If and when we stop that SOB, I will fix him?

A. No. No statement was made like that over the radio. Not while I was in charge.

Q. Was the statement made while anyone was

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chance.

Q. Did he ever hit you?

A. No, he didn't.

Q. What hand was Mr. Lowery using when you blocked him?

A. Repeat.

Q. What hand was Mr. Lowery using when you said you blocked him?

A. I caught Mr. Lowery's right hand because I caught it with my left hand.

Q. Would you hold up your hand?

A. No. When he was --

Q. Hold up your left hand. Okay. You agree you have a large hand?

A. Yes, I do.

Q. And, if I am not mistaken, the front seat of the police automobile was what we call a full bench seat?

A. Yes, it is.

Q. And you can't get between the seat?

A. No.

Q. It's a full bench seat?

A. Yes. It is a full bench seat.

Q. What did you do with his hand after you caught it?

MR. OBRION: After he blocked it. That was the word he used.

BY MR. SAGER:

Q. Well, we will come back in the actual events because we are getting out of sequence. To your knowledge, Mr. Stovall, in the different statements you have given, whether written statement or the statement to the insurance investigatory, did you say the same things then as you're testifying to today?

A. Yes. Best of my knowledge, I am.

Q. Now, to go in proper order, I believe you, at the time of the break we had the three police cars leaving the Powell Funeral Home going after the Lowery automobile, the vehicle in which this man was driving; is that right?

A. Yes.

Q. Tell me what happened. Who saw the car? To you knowledge, who stopped the car? Tell me what you remember.

A. Officer Redd did.

Q. All three of you did what?

A. Officer Redd.

Q. Did what?

A. He stopped the vehicle and he's the on -- he was the one behind he vehicle giving the route that the vehicle was taking until we got him stopped at Willow Oaks.

Q. Now, were you there when Officer Redd out on

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Q. That's Officer White?

A. Yes, it was. But, he pulled in behind me.

Q. Now this is somewhere between 1:00 and 2:00 in the morning?

A. Yes, it was.

Q. Your car is in front of Mr. Lowery's car who had already stopped?

A. No. Not in front of Mr. Lowery's. Mr. Lowery had pulled into a parking place. He was in like this. Officer Redd like this and I'm like this.

Q. Both your cars are facing each other?

A. Yes. And Mr. Lowery pulled into a parking place.

Q. Did you all pull your front bumpers up to

each other?

A. No, we did not.

Q. Now, who went to Mr. Lowery's car first?

A. Officer Redd.

Q. Did you see him do that?

A. Yes, I did.

Q. Was your window down?

A. At that time I was standing out on the front end of my vehicle standing beside it.

Q. Now how far away was the door to Mr. Lowery's car when you were standing there watching it?

A. Repeat.

Q. How far away from you -- you said you were standing there in front of your car?

A. (Witness nodding.)

Q. When Mr. Redd went to Mr. Lowery's car, you were standing in front of your car?

A. Oh, okay. Approximately two car lengths.

Q. Two car lengths which is about the length of this room?

A. Yes.

Q. Maybe 20 feet, 25 feet?

A. 20, 25 feet.

Q. What did you see Mr. Redd do and what did you hear Mr. Redd say when he went to Mr. Lowery's car?

A. Officer Redd walked up to the driver's side of Mr. Lowery's car. Mr. Lowery was getting out of the vehicle. He got out. Officer Redd advised him he needed to see his driver's license and registration. At this time a female subject got out of the vehicle, out of the passenger side, closed the car door, went down by the car and went into Willow Oaks Apartments.

Q. I'm sorry?

A. And then at this time Officer Redd called in

another 10-27 on Mr. Lowery's license. And it still came back suspended.

Q. Was it a different license?

A. No. It's the same one. But, the one we called in first was a 10-27. We called -- the DMV gave us.

Q. I just lost you. Do what?

A. When they run a 10-27 through DMV they give you back what it is when you have got your license the first time. The very first time you got your license, they put it into the computer. That's what we got back the first time saying it was suspended. That's why Officer Redd ran another 10-27 on his driver's license when he got it in his hand and it came back the same person. At this time Officer Redd advised Mr. Lowery his license was suspended. And Mr. --

Q. This is while they were standing outside of Mr. Lowery's car?

A. Yes. Standing outside.

Q. And the woman who had gone --

A. Yes.

Q. Nothing wrong with the woman getting out of the car and walking away, to your knowledge?

A. Not at the time.

Q. Did she walk or run?

A. She ran.

Q. She ran?

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A. Not until after Officer Redd advised him that his license was suspended.

Q. All right. Then what happened?

A. The subject became unruly and started cussing. And he was saying my license ain't suspended and used a few MFs and stuff like that.

Q. Tell me what MFs he used.

A. He said, "Motherfucker, my license ain't suspended. You all -- something about you all is crazy or something. Officer Redd tried to calm him down and advise him if you come back to my vehicle, I will run a 10-27, not a 10-27, an IQ, on your license and find out why your license is suspended. And he didn't want to do that at first. He said, "I'm not going back to your vehicle." And then Officer Redd explained to him again, he said, "Okay. let's go back there. I want to know, too." So he went back. They were walking on back like wasn't nothing wrong. He had calmed down like nothing was wrong walking back to the vehicle.

Q. Let's slow down. At that point had you said anything to Mr. Lowery?

A. I hadn't said a word.

Q. You were just observing?

A. I was just observing.

Q. You said you saw or heard Mr. Lowery use some

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A. Yes, I do. But, its's between 1;00 and 2:00 in the morning. I cannot se his eyes. And I sure wasn't close enough to smell his breath.

Q. It would be important to determine if the person was either posing a threat or a danger, would it not?

A. Any time you stop a car in between 1:00 and 2:00 in the morning, there is always a chance of being danger or threat there. That's why we back them up.

Q. That's why you what?

A. That's why we always back each other up.

Q. Now at that point did you all do a pat down of Mr. Lowery?

A. Didn't have a reason to.

Q. That's what I was trying to determine. You

all had no reason to pat him down because you weren't in fear of Mr. Lowery, were you?

A. No. We was not at the time.

Q. And his conduct was, as far as you're concerned, other than a few curse words, was okay?

A. I advised you a few minutes ago Officer Redd calmed him down. They walked back to the vehicle.

Q. Then what happened?

A. After they got back in the vehicle, Officer Redd got on the driver's side and Mr. Lowery got on the passenger side. They closed the doors. I was still

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A. Going to write him a traffic summons for driving on a suspended license. And Mr. Lowery knew this. But, he told him he would found out why his license was suspended.

Q. Wait. I am losing you. What was the reason

to take Mr. Lowery back to Redd's automobile?

A. To write him a traffic summons for driving on a suspended operator's license.

Q. Not to do anymore dispatching?

A. He also advised Mr. Lowery once we are back there at the vehicle, we will run a QT and find out why your license is suspended. He said he wanted to know, too.

Q. That you could have done if you wanted to on one of your portable walkie-talkies?

A. Yes. But, he still had to go back to the vehicle and write the ticket.

Q. And he could have done a lot of things. He could have left Mr. Lowery standing there with you observing him while he went back and wrote the ticket up?

MR. OBRION: Let me object to the supposition and hypothetical nature of what could have and

would have. And this witness will be glad to tell you what happened.

BY MR. SAGER:

Q. In any event, you informed Mr. Lowery, somebody informed Mr. Lowery they were going to write him a summons?

A. Officer Redd did.

Q. And even after he did that, Mr. Lowery went with Officer Redd to get his summons?

A. Yes, he did.

Q. He was not under arrest?

A. No, he was not under arrest. He was going to get a traffic summons and he could go home.

Q. They got into the front seat of Redd's automobile?

A. Yes, they did.

Q. Closed the door?

A. Yes, the did.

Q. Were the windows up or down?

A. The window was up.

Q. There was no overhead street lamp there, was there?

A. Nothing but the dome light on the inside of the vehicle.

Q. What did you do then?

A. I stood right there where I was at the front end of my vehicle until Officer Redd called me after Mr. Lowery got out of the vehicle twice and got back in and got out and got back in.

Q. Now, Officer Redd called you?

A. Mr. Lowery got out of the, of the vehicle. Officer Redd leaned over -- no, he got out of the vehicle and called over the car, told Mr. Lowery to get back in the vehicle. Mr. Lowery got back in the vehicle, stayed in

there a few seconds and then he got back out again. At this time Officer Redd called me on his radio and told me to come over there and get in the car with him. And I got in the back seat.

Q. What police authority, to your knowledge, did you or Mr. Redd have to order Mr. Lowery at any time to get into Redd's vehicle?

MR. OBRION: Object to the form of the question. Asking for a legal conclusion on police authority. You may answer.

THE DEPONENT: He did not order Mr. Lowery back in the car. He told him to get back in the vehicle. Mr. Lowery got back in the vehicle, stayed a few seconds and got back out.

BY MR. SAGER:

Q. Mr. Lowery was free to get out of the car if he wanted to?

A. Yes. But, Officer Redd asked him to get back in and he did. He did not order him to get back in.

Q. Do you know why he asked him to get back in?

A. No, I do not. I was not over there at the time. I just heard him when he told him.

Q. But, you were standing nearby watching him?

A. Yes.

Q. You saw Lowery sitting int he car and then you saw Lowery get out of the car?

A. Yes.

Q. Lowery didn't run away?

A. No, he did not.

Q. Was he using any profanity or cussing?

A. Yes. He was cussing at the time. But, I can't recall every word he was saying.

Q. Now which time?

A. When he got out of the car.

Q. The first time?

A. The first time and the second time. But, each time it was not no whole lot of loud profanity. I could just barely hear what he was saying. But, I know they were cuss words because I heard motherfucker this and all that.

Q. But, when he asked, as you say he was asked to get back in the car, Mr. Lowery got back in the car?

A. Yes, he did.

Q. How long did he stay in there?

A. Wasn't very long. As soon as the door closed, he was in there a few seconds, got right back out.

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close.

Q. How many car lengths was between your car and Mr. Redd's car?

A. I'd say approximately for to four and-a-half car lengths.

Q. And while you were standing there watching, Officer Redd called you on his radio and said what to you?

A. He advised me to come over there and get in the back seat and observe what was going on.

Q. Those were the words he used?

A. No. Then ain't the words he used exact. But, them the words to the best of my knowledge that I can put it, that I can remember.

Q. When Lowery got out of the car the first time, did he jump or run out of the car? He just opened the door and stood up?

A. He just opened the door, stuck his leg out, sat there a second, stood up. That's when Officer Redd got out of the car, advised him to get back in. He got back in the car, closed the door halfway, he didn't close the door

completely. He just pulled it up and he stayed there a few seconds, slung the door back open, got back out again.

Q. You didn't make any movements yourself, did you?

A. I took two or three steps. And before I could

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out there, they are going to get upset when they get a ticket. Most of them will cuss you and act like that

Q. So he was acting like 90 percent of the people.

A. Yes, he was.

Q. But, you still have a right if you want to exercise it to do a pat down weapons check?

A. Yes, we can. But, I didn't see no need to at the time.

Q. And after he got back in the second time, is that when Redd called you or did Redd call you while he

was standing out?

A. He called me while he was standing out.

Q. So you started walking over?

A. Yes, I did.

Q. And Mr. Lowery got back in the car?

A. No, he did not. I walked up to Mr. Lowery and I advised him --

Q. Is this the second time?

A. The second time. That's when I advised Mr. Lowery, said go get back in the car, let him write the traffic summons and you can go on. He looked at me and said okay. He got in the car and closed the door. And I got in the back seat and closed the door.

Q. No, did you see what, if anything, Mr. Lowery did when he was standing outside of the car the two times he got out?

A. Repeat the question.

Q. Did you see him do anything other than stand up and get out of the car?

A. No, I didn't.

Q. What happened after you got into the back of the car?

A. Officer Redd, if I am not mistaken, called the station and called in for the QT to find out why his license was suspended. And while it was going through DMV, I guess getting ready to come back to us, that's when the whole incident occurred.

Q. Tell me about this whole incident.

A. Okay. That's when Mr. Lowery became very nervous and he got all jump, putting his hands in his pockets and stuff. And that's when I --

Q. He's still sitting down?

A. Yes.

Q. What hand did he put in what pocket?

A. If I am not mistaken, he was using this hand like this doing something like that, like pulling something up. I don't know what he was doing really.

Q. Using his right hand?

A. Yes.

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A. Yes. I was sitting up on the edge of the seat with one arm on the seat like this listening to what was going on.

Q. One arm up, you got it behind Mr. Coleman, but we will say behind Mr. Lowery

A. Well, these cars are not as wide as the seat is. I was not directly behind him. But, in order to get where you want me, I was similar to right here. Because I was over his left shoulder.

Q. Over his left shoulder?

A. Yes.

Q. And leaning forward?

A. Yes. Leaning like this. I could see over -- I could see his lets and I could see partially right down across his arm.

Q. Now, what happened at that point?

A. At this point he became unruly.

Q. Who is?

A. Mr. Lowery became unruly. Started to cursing. And at this time I adjusted myself like this so I could get a better look over there, what he was doing with his hand like this, because his hands were crossing. And at this time I tried to get a better look. And at this time, this is when Mr. Lowery leaned over like this, not me, that's when he got Officer Redd down into the seat.

Q. Got him down in the seat?

A. Yes. That's when he came over top of Officer Redd, had him pinned down in the corner of the

seat.

Q. Haven't we missed something here? Was Officer Redd doing anything to Mr. Lowery before this happened?

A. No. He was -- if I am not mistaken, I think he was writing the summons or waiting for the dispatch to give back why his license was suspended.

Q. While Mr. Redd was either writing the summons or waiting for the dispatcher, Mr. Lowery starts cursing again?

A. He started in cursing Officer Redd.

Q. This is the third or fourth time you heard him cursing?

A. Yes. At this time that's when he, while he was cussing, he just turned and dove in on Officer Redd.

Q. What did he do when he dove on him?

A. He already was coming like at him. He

came at him like this. And I saw him when he came down at his face like this. And at this time Officer redd hollered knife.

Q. Now back up a minute. You said that Mr. Lowery had his right hand on to his left pocket?

A. Mr. Lowery had his hand over here like this. And he was doing something with his hand. Officer Redd, he reached for his hand or something, I know his hand, Officer Redd's hand came over and Mr. Lowery's left hand went up. When the left hand went up, that's when Mr. Lowery came completely on over on Officer Redd's side.

Q. Did you see Mr. Lowery take anything out of Mr. Lowery's left pants pocket?

A. Did I what?

Q. Did you see Mr. Lowery take anything out of Mr. Lowery's pants pocket, his left pants pocket? You said that's where he was?

A. Did I see Mr. Lowery take something out of Mr. Lowery's pocket?

Q. Yes.

A. I did not see Mr. Lowery take anything out of his pocket. but, at the time he came across, I saw his hand come across Officer Redd's face. And that's when I saw the blood come from Officer Redd's face and he hollered knife.

Q. Back up. You said you saw Mr. Lowery's left hand go up in the air?

A. Yes. His left hand went up. Officer Redd was reaching for him with his -- his left hand came up.

Q. What happened to Officer Redd?

A. When his hand came up, he hit Officer Redd's hand, officer Redd fell back like this. That's when Officer -- Mr. Lowery came across and fell on top of Officer Redd.

Q. Fell on top of him?

A. In other words, he came across like this and he was leaning on over top into the car.

Q. Now Officer Redd had fallen to his left because you said Mr. Lowery moved up with his left hand.

A. I don't know if he fell to his left or to his right. But, Officer Redd was back into the seat lying back like this and Mr. Lowery was on top of him.

Q. While Officer Redd was up against the driver's door?

A. He was pinned back up against the door in the seat.

Q. And the only door he was pinned back against would be the driver's door?

A. Yes. That's the driver's door.

Q. Now, at this point, is it your testimony that the only thing you saw Redd do was put his hand on Mr.

Lowery's hand before mr. Lowery's left arm went up?

A. Before Mr. Lowery's left hand went up, he was trying to -- I don't know what he as trying to get out of his pocket. But, he had his hand over here doing something to his pocket.

Q. Who did?

A. Mr. Lowery.

Q. Mr. Lowery had his hand on his left pocket doing something with his pocket?

A. Yes.

Q. And you were leaning over the seat watching him do that?

A. Yes.

Q. Did you say anything to him?

A. No. I did not say anything to him. Because I didn't have no reason to suspect anything was coming out of his pocket or he would try to do anything.

Q. Did you see any reason, observe any reason or hear any reason for Mr. Lowery to be cursing again?

A. No. Not really. Because he already knew why he was getting a ticket and he knew what we were trying to do through he dispatcher, find out why his license was suspended.

Q. You said you told him all you wanted to do was give him a ticket, he is free to go?

A. I said get in the car, get your ticket, you can go. He looked at me, say okay, got in the car and closed the door.

Q. So now you're in the car and how much time has gone by before Mr. Lowery does this cussing and grabbing at his pockets?

A. Officer Redd called the dispatcher, gave him the information she needed and she said 10-4, stand by. And

a few seconds after that, that's when everything broke loose.

Q. For no reason at all from what you could observe?

A. For no reason at all.

Q. Now, how long did it take Mr. Lowery to get his right hand into his left pocket?

A. How long?

Q. Yeah.

A. I couldn't say. This happened so fast. By the time he was over here with his hand doing this, and officer Redd reached for his hand and he brought his hand up.

Q. That's when Redd went back into the driver's door?

A. Yes. The way he brought his hands up, he came up and he hit Officer Redd, crossing hands across the chest looked like at the same time. Just knocked him back against the door.

Q. And then the next thing you saw was Mr. Lowery leaning over toward or on top of or into Officer Redd?

A. Well, after he knocked Officer Redd back, Mr. Lowery came across the seat and he came like this. And I saw Officer Redd, blood on his face, and Officer Redd hollered knife. At this time I reached across the seat, grabbed Mr. Lowery, pulled him up, and I couldn't get him up. So at this time I caught him by the back of his shirt right along there and I hit Mr. Lowery in the back of his head right along here twice.

Q. With what?

A. With my fist. And he did not feel a thing.

Q. How do you know what he felt?

A. He never did move. He never did turn around. He never did flinch. He was still on top of Officer Redd.

Q. Let's go back and show us with Mr. Coleman how you grabbed him with your arms.

A. All right. He was laying over. I reached and grabbed him by the shoulder blades trying to pull him up and I could not get him back. So at this time I reached and grabbed him by the back of his shirt and hit him back here twice.

Q. So you hit him first twice with your hands?

A. Yes, I did.

Q. Was it before or after you heard this thing knife?

A. After I saw the blood coming off Officer

Redd's face and he hollered knife, that's when this all happened.

Q. That's when you grabbed him by the back of the shirt and hit him or smacked him in the back of the head?

A. I did not smack him. I punched him. And I punch.

Q. With your fist?

A. Yes, I did.

Q. Did you haul off and -- show is how you did that. I mean, we don't want you to hurt Mr. Coleman.

A. I ain't going to hit him. I was up like this I pulled him up and I came down. And I came down with force, too.

Q. Now, would you lean back up? Was Mr. Lowery down when you said you came up and over the seat, were you beating him on top of his head like that?

A. Okay. In a regular car, the size of these chairs, I was able to stand up and reach over and catch him by the back of the shirt and pull him up to me.

Q. So you were able to do that?

A. Yes, I was.

Q. And were you able to pull him back up to you with one hand?

A. Yes, I did pull him up to hit him.

Q. Just by holding his shirt?

A. I did not get him up. I got enough of his head off Thomas so I could hit him. Off Officer Redd.

Q. What was Redd doing?

A. He was hollering knife.

Q. He just kept hollering knife?

A. He hollered knife at least three times that I can remember.

Q. He hollered knife three times?

A Yes.

Q Did you ever take your arm and wrap it around Mr. Lowery's neck and hold into him?

A No, I did not. Because he had hollered knife and I ain't going to put my arm around his neck and let him cut me too.

Q Are you holding him by his collar hitting him with your fists?

A Yeah. But, he had to turn all the way around in order to cut me with the knife.

Q That's why I'm asking you.

A When I got him by the back of his collar, that means he got to turn completely this way or that way to get to me.

Q So you felt like --

A So that would have been a whole lot better for reaching around him and he could have cut my hand if

he wanted to.

Q So you felt like you had him under control by holding on?

MR. OBRION: That's not the witness' testimony.

Q Did you have him by his shirt collar. I was trying to get him up enough to get his attention when I hit him to get him off Officer Redd.

A I had him by his shirt collar. I was trying to get him up enough to get his attention when I hit him to get him off Officer Redd.

Q And you did that?

A O got his attention for a few seconds. He came up and turned on me. And when he turned --

A Wait a minute. The back of -- don't you still have him by the collar?

A No, I don't. After I hit him twice and he

didn't move, I turned him loose and reached for him again. That's when he got up off Officer Redd and he got up in the seat -- get up on your knees. He got up on his knees and that's when he was coming across the seat like this. And I caught his arm, drew me revolver and I shot him. At the same time I shot, Mr. Lowery ducked down.

Q Would you take this, which was Exhibit Number 2 and put that in Mr. Coleman's hand to show us what you remember, where it was when you first saw it?

MR. OBRION: Again, we object to the whole charade that you're going through here tonight.

MR. SAGER: I understand. You object to

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Q Pinned up against the seat?

A No. Not pinned up against the seat of the car. He came across the seat with a force and I pinned his

hand away from me.

Q While you were able to do that, you unsnapped your gun, pulled it out of your holster and shot him?

A Yes, I did.

Q Was that an automatic or a --

A It was a revolver.

Q Where did you shoot him?

A When he was coming across the seat, I aimed for Mr. Lowery's shoulder, Mr. Lowery ducked coming across the seat and his head came down in the way.

Q That direction when you shot him?

A I pulled my revolver, aimed like this, and Mr. Lowery was coming down and that's why --

Q Show us -- at this point did Mr. Lowery have a hat on or was his hat off?

A I cannot remember if he had a hat on.

Q Show us with your hand, finger like this, where you believed the barrel of your gun was when it went off in relationship --

A I cannot remember where the barrel of the gun was. I was aiming for Mr. Lowery's shoulder, but Mr. Lowery was ducking down at the same time coming across the seat.

MR. OBRION This is the second time. You asked him a whole series of questions coming from Mr. Powell's Funeral Home. It is 9:10 and I would please request you not ask it again.

BY MR. SAGER:

Q From your demonstration, is it true that Mr. Lowery, in your opinion, his head and shoulder part of his body was over the front seat in toward the back seat when you shot him?

A It was partially. But, the way you got this

set up, there's no way you can really get the true picture of it.

Q Now, what happened after you shot him?

A After I shot Mr. Lowery, he stood there for a second, like just looked at me like he didn't know what had happened, and all the sudden he slumped down in the seat.

Q Then what happened?

A I holstered my revolver, looked at Officer Redd, asked him if he was all right. He said yes. And I could see the blood coming and we got -- he got out of his side, on the passenger side, I got out of the back seat, he walked around and we opened the door and helped Mr. Lowery out of the car. And we put him on the ground trying to get him stable. And we called the rescue squad and called the chief of police and called the lieutenant.

Q You helped him out of the car?

A Yes, sir. We did.

Q Was he still alert?

A Yes, he was not -- I don't -- I couldn't say alert. He was more like saying he was cold.

Q He was cold?

A Yes.

Q You felt he was better off laying on the street, the ground, than staying in the automobile?

A Well, at the time we didn't know where he was hit yet. Didn't know if he was hit in the head or the shoulder or where. So we got him out of the vehicle, called the rescue squad. Our problem was then after this had happened trying to get him stable and get the rescue squad there.

Q How did you get him stable.

A We -- every time Mr. Lowery got -- we turned our back calling on the radio, because people was

coming out of the buildings and things, trying to get the place secured and call the rescue squad and everything. And we turned around and Mr. Lowery was crawling back into the vehicle. So at this time me and Officer Redd caught him ny each arm, brought him back out of the vehicle, laid him back on the ground and a few seconds later the chief and lieutenant showed up. And then the rescue squad.

Q So Mr. Lowery was, in fact, trying to get back in the car after he was shot?

A Yes. But, at the same time there is a shotgun laying right across in front of the back seat of the police car.

Q Say that again.

A We have shotguns inside os the police car right up under our feet in the front seat. And Mr Lowery was going back into the car. His hand was on the shotgun

the first time we pulled him out of the car. So we didn't know if he was going to got the shotgun or what. So we got him back out of the car. And that's why my instructions were to Officer Redd, let's get back away from the car so he is going to get the shotgun, he can't use it on us.

Q Any reason why you didn't remove --

A The shotgun stays there all the time.

Q You never take it from there?

A Only if we need it.

Q Now, your attorney here objected to Mr. Coleman sitting in the chair. I will ask Mr. Coleman to move away. And if you sat in the chair there to tell us how it happened, would you do it any differently than what you demonstrated so far?

A Yeah. Probably would have. Because I probably can demonstrate a lot better than I was telling

him.

Q Go ahead and demonstrate and explain.

MR. OBRION: Our objection wasn't just to Mr. Coleman. But, go ahead.

BY MR. SAGER:

Q Go ahead, please.

MR. OBRION: Is there something -- you're requesting of the witness that to the extent he can give you a more accurate description of his testimony without Mr. Coleman and with himself, that he do so?

MR. SAGER: Correct.

MR. OBRION: Okay.

THE DEPONENT: Okay. Mr. Lowery was sitting in the passenger seat. And Officer Redd was sitting in the driver's seat. And I was up on the back end of the seat about middle way over Mr. Lowery's left shoulder. Mr. Lowery became, began cussing, became

unruly. At this time Mr. Lowery was fumbling with his left pocket with the right hand.

Q What was he doing with his left hand?

A Had his left hand, it was just laying there, I guess. I didn't pay no attention to it. I saw his right hand over. And at this time Officer Redd asked him what it was he had in his pocket. Reached for his pocket or something like that.

Q Who reached for his pocket?

A Officer Redd. Because I was on the back and I couldn't reach over the seat and grab his hand.

Q Why couldn't you?

A Why couldn't I? Because I am over his left shoulder and his right hand is here. How am I going to grab his hand? I have to come on this side to grab his hand.

Q Go ahead.

A So Officer Redd reached for his hand. At this time he took the left hand; knocked Officer Redd back like this, pulled, I don't know what he pulled out of his pocket, came across on Officer Redd like this, and at the same time he was coming down. And I saw Officer Redd, I saw the blood on Officer Redd's face, and he hollered knife. At this time I reaches across the seat with both hands grabbing Mr. Lowery by his collar, both his shoulder blades right up in here. And I could not pull Mr. Lowery up off of Officer Redd.

Q What was he doing to him while he was on top of Officer Redd?

A He was still cutting at him like this.

Q Did you see blood spurting all over the car?

A No. I did not see blood spurting. I saw the blood on his left cheek.

Q. Where did you see him slashing or cutting or

doing --

A. I saw the blood on the Officer Redd's left cheek.

Q. But, you said that Lowery was on top of Officer Redd now or up against him?

A. He was on top -- Officer Redd pinned up against the door in the seat. And Mr. Lowery is on top of Officer Redd and he's coming down like this. I didn't know if he was cutting or hitting him. Officer Redd hollered knife. And at this time I reached and grabbed him by his shoulder blades which I could not move him. And at this time then I grabbed him by the back of his shirt right along in here, pulled his head up some and hit him in the back of his head twice, hard as I could hit him in that situation, and it did not phase Mr. Lowery. At this time he raised up off Officer Redd, came around in the seat.

Q. He didn't turn that way, did he?

A. No. he didn't turn. But, I'm turning because of the mike. And he was on his knees coming across the sat and his stomach right along about middle ways coming across the seat like this. I reached and grabbed his right hand with my left.

Q. Show us so you can demonstrate it better where you believe his head was when your gun went off.

A. If this is the seat, which it don't look like it, he was coming over the seat like this. He was like -- he was on his knees or on an angle like coming across the seat. And at this time I caught his left hand, caught his right hand, my left, withdrew my revolver and shot.

Q. While you were holding, he was coming over the front --

A. Yes, he was.

Q. Front to the back seat?

A. Yes, he was.

Q. So you were strong enough to hold or block his hand?

A. No. I wasn't strong enough. I was just fast enough to block it so he couldn't cut me.

Q. I gather then you didn't hit him in his face?

A. When?

Q. When he turned around at you?

A. No, I did not.

Q. And you blocked his arm?

A. He turned, when he came off Officer Redd, he turned, all I saw was this shiny object coming down at me and I knew Officer Redd had been cut or something because I saw the blood. And I did not wait and hesitate to try to hit him in the face. I drew my revolver, blocked his hand and shot him.

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will get them over here. And we kept the people back until

the lieutenant and the chief arrived. Once they arrived a few minutes later, the chief asked me if I am okay. Yes, I am okay. He said get in your patrol car and go to the station and write a statement and wait for me. And that's what I done.

Q. And Redd went in his patrol car and did the same thing?

A. I know -- I remember hearing him telling Redd to get in the patrol car. But, where he told him to go, I do not know. I know I went to the station. And I went in the office and filled out my statement.

Q. And as you sit here today you have never seen a knife with respect to this incident, have you?

A. I didn't even know what was the weapon used until the next day.

Q. Let's back up a minute. You said after Lowery is shot, you all attempted to take him out of the car

and lay him on the ground, correct: You said Mr. Lowery kept trying to get into the car and you were concerned because as he tried to pull himself into the car, there was a shotgun in the front seat?

A. Yes.

Q. Under the seat?

A. Yes.

BY MR. SAGER:

Q. If you were concerned --

MR. OBRION: And it will be on the record and we can see what it says.

MR. SAGER: I sure hope the Judge gives me sanctions and maybe even default Judgment for this, John.

MR. OBRION: I hope he gives me sanctions and default. Because I don't think prisoners of war have had to endure a deposition like this. I'd like to ask him the

questions and I'd like him to answer them

MR. SAGER: Please mark the record again.

BY MR. SAGER:

Q. You were concerned about keeping Mr. Lowery away from the bottom of the seat?

A. From where?

Q. The bottom of the front seat?

A. No. I was concerned about keeping Mr. Lowery away from his vehicle.

Q. And one of the concerns was because you all had a weapon in the vehicle, your shotgun?

A. Yes. We do have a shotgun in the car.

Q. So you were concerned about keeping him away from that weapon?

A. Yes.

Q. Therefore, if you thought he had another

MR. SAGER: Or any of them.

MR. OBRION: But, now you're back to the prior military.

MR. SAGER: I'm trying to make sure when he says you have my records, that we have eliminated the Marine one, that's the one he told us about specifically, I want to know what others are there.

MR. OBRION: And he's telling you about one in connection with South Boston. And your question is?

BY MR. SAGER:

Q. Tell me about that one.

A. That's the one that's in my record and you have the grievance on. That's the one I had the grievance on.

Q. You got suspended for three days?

A. Yes. And that's the one the grievance is on.

Q. And that was back in what, 1985?

A. I cannot remember what year it was.

Q. What happened then?

MR. OBRION: Let me enter an objection as to discussions of '85 incidences in his past record relating to grievance and the charges thereupon. They have nothing to do with the allegations of this particular lawsuit. But, he may continue.

BY MR. SAGER:

Q. Thank you. What happened in 1985 that caused you to be suspended for three days from the police force?

A. I was on patrol on third shift. Went up to Express Market which is on Wilborn Avenue in the City of South Boston. There were two subjects walking across the

parking lot with open beer in their hand drinking it. I advised the subject to pour the beer out and put the empty cans in the trash can. And they refused. So at this time I placed one of the subjects under arrest. The other subject put his can in the -- pour his beer out, put it in the trash can. And the one that refused, I handcuffed him, had him up against the car. Two other patrolmen pulled up to assist me because the peoples inside the Express Market called for back up for me. And on arriving, they unhandcuffed the subject I had handcuffed, released him and let the subject left. And then this grievance came about. Because I got suspended for three days for something they accused me of doing that I did not do.

Q. Did you grab one of the individuals by the arm in that incident and throw him up against the car?

A. Yes, I did. And I handcuffed him.

Q. Did you take your gun belt off and put it on

the hood of the police car?

A. No, I did not.

Q. Did you tell someone named D. D. Lowery to come on because you wanted him?

A. No, I did not.

Q. Did you tell one of the other police officers there that you weren't going anywhere because Mr. Lowery wanted to fight and you were going to fight him?

A. No, I did not.

Q. Did one of the officers grab you by the arm to take you back to your car?

A. He grabbed my by the arm. But, he did not take me back to the car.

Q. What officer was that?

A. Officer Elder.

Q. Officer who?

A. E-l-d-e-r. Elder.

Q. Where's he now? Do you know?

A. He is still with the City of South Boston.

Q. As a police officer?

A. Yes, he is.

Q. And why is it that he didn't take you back to the car when he grabbed you by your arm?

A. The statement he made to me, that I needed to be restrained, which I did not think at the time, I had made a proper arrest and they were releasing the subject without my say so.

Q. You were pretty upset about that?

A. No. I was not upset. I just wasn't ready to leave because I had my handcuffs on the subject.

Q. Was Crump a police officer?

A. Yes, he was.

Q. Where is he now?

A. He's still with the City. But, he's not a

policeman now.

Q. Where is he with the City?

A. He is working with the water treatment plan.

Q. Did Crump tell you also to go back to your car?

A. Yes, he did. When he told me, I did go because he was the officer in charge at the time.

Q. Did you ever take your hat off, lay your radio and hat on the car and tell anyone, "I'm going to whip his ass now?"

A. No. I did not say that. I took my hat off, sure enough I took my hat off before I put the handcuffs on the subject, and I had my radio stuck in my back pocket because I did not have a holster for it. And yes, I did take my radio out and lay it on the car.

Q. Was the person you said put your cuffs on, was his name Jeff Bagby?

A. Yes, it was.

Q. Did you know him?

A. No. First time I ever seen him. I found out who he was later on.

Q. Was he a big guy or small guy?

A. He was a small guy.

Q. There was a name of a person named Monty Lowery.

A. Monty.

Q. Who was he?

A. He was -- he was with D. D. and Jeff. And I can't think of the other subject's name.

Q. Do you know where he is now?

A. Yes. He lives about a quarter of a mile up the road from me on the same side.

Q. And does Mr. Bagby, do you know where he is?

A. Last I heard he was still living in Scottsburg.

Q. Scottsburg?

A. Yeah. S-C-O-T-T-S-B-U-R-G.

Q. Is he a white or black man?

A. White.

Q. Is Mr. Monte Lowery white or black?

A. All the subjects were white.

Q. So that Lowery is not related to Jerry Lowery?

A. No, he is not.

Q. Did you know Jerry Lowery at all before this incident?

A. I had never seen the subject before that night.

Q. What happened as a result of your appeal on this police grievance thing?

A. They ruled in my favor.

Q. Did you have weapons training, by the way,

in the military?

A. Yes, I did. Had firing range.

Q. And can you tell me the exact discharge that you got from the military?

MR. OBRION: Second time. It was honorable.

THE DEPONENT: I got a general discharge at first. Then I got a honorable discharge. I got a general discharge because of a shaving condition I had.

Q. A What?

A. A shaving. Every time I shaved my face would break out. So they let me out -- I think I got out a couple of months early. Then later on I got an honorable discharge because I did not do anything wrong not to get an honorable.

Q. Do you remember your Marine I.D. number?

A. That was my social security number.

Q. They used social security numbers at that time?

A. 224-84-8968.

Q. Where was your primary duty station?

A. Cap Lejeune. I toured a lot. I cannot name all the places.

Q. You toured because of boxing?

A. Yes. My main place was Camp Lejeune. Most time I came back, that's where we came back to.

Q. Did you ever get knocked out?

A. No, I didn't.

Q. Took a pretty - - you could take a pretty good blow?

A. No. But, I can give one.

Q. Have you ever taken any medication for nerves to calm you down?

A. Not that I can recall.

Q. Ever taken anything for sleeping?

A. No.

Q. Sleeping pills?

A. Nothing but No-Doz, stuff like that.

Q. No-Doz to stay awake?

A. Yeah.

Q. Caffeine?

A. (Witness nodding.)

Q. Have you taken that while you're on duty?

A. No. I haven't taken it while I was on duty. I have taken it while I was playing softball.

Q. So that's another sport that you have played in, softball?

A. No. I played softball while I am here. While I am a policeman.

Q. At South Boston?

A. Yes.

Q. What other sports do you do?

A. Play basketball.

Q. Basketball?

A. (Witness nodding.)

Q. Do you still work out in a gym as far as boxing or teaching anyone to box?

A. No, I don't.

Q. Do you run?

A. Nothing but softball or basketball.

Q. Job?

A. Only when I am playing softball and basketball.

Q. Before this incident occurred with Jerry Lowery, had you ever shot your weapon while in the course of duty other than target practice?

A. No, I haven't.

Q. Have you ever shot your gun while off duty?

MR. OBRION: Other than target practice?

BY MR. SAGER:

Q. Other than target practice.

A. No, I haven't.

Q. Never in the air at a bird or --

A. No.

Q. And I am including any other places where you may have -- did you have a gun at the Halifax Police Force?

A. Yes, I had.

Q. Did you ever shoot your gun there?

A. No.

Q. Other than target practice? Do you keep guns such as hunters or --

A. No. Only to --

Q. Rifle?

A. I don't have no rifle, no shotguns. Only

thing I have is a handgun.

Q. How many handguns do you have?

A. I got three.

Q. How many did you have at the time of this shooting?

A. One. That's the one was issued to me.

Q. What was it?

A. .38 Special.

Q. What kind of bullet did you keep in it?

A. .38.

Q. What it a hollow point or --

A. No. Round nose.

Q. Did you keep a backup weapon then?

A. No, I don't.

Q. And you now have three guns?

A. At home.

Q. What are they?

A. I got two .9 millimeters.

MR. OBRION: Let me object to relevance as to what handguns he now had at home.

BY MR. SAGER:

Q. Two .9 millimeters and what else?

A. And I got a .45.

Q. Just out of curiosity, why is there a need to have --that's in addition to your service revolver; is that right?

A. Yes.

Q. Total of four guns?

A. Yes. No. I have a total of three guns. One gun belongs to the City.

Q. Which one is that?

A. The .38.

Q. I thought you said you had two .9 millimeters

and a .45?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

JERRY LOWERY,	)
	)
Plaintiff,	) Civil Action No. 92-0004-D
	)
v.	)
	)
CITY OF SOUTH BOSTON, VIRGINIA,	) MEMORANDUM OPINION
	)
LARRY STOVALL, individually and in his official capacity as a police officer,	) By: Jackson L. Kiser, Judge, United States District Court
	)
T. E. REDD, individually and in his official capacity as a police officer, *and*	)
	)
J. V. SIMMONS, individually and in his official capacity as a police officer,	)
	)
Defendants.	)

PROCEDURAL HISTORY

This is an action filed by plaintiff, Jerry Lowery, alleging

various violations including: Virginia state law negligence, Virginia state law assault and battery, and 42 U.S.C. §§ 1983 & 1985 civil rights violations. Defendants, City of South Boston, Officer Larry J. Stovall, Officer Thomas E. Redd, and Chief J.V. Simmons (collectively "Municipal Defendants") have filed a consolidated motion for summary judgment. Lowery has filed a brief in opposition to the Municipal Defendants' motion. Oral arguments were heard before me in Lynchburg District Court on October 6, 1992. The motion is now ripe for disposition.

SUMMARY JUDGMENT STANDARD AND FACTS

Federal Rule of Civil Procedure 56(c) provides that a moving party is entitled to summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the answers party is entitled to a judgment as a matter

of law." Fed.R.Civ.P.56(c). The party moving for summary judgment is initially responsible for identifying those portions of the factual record which it believes establish that there are no genuine issues of material fact. Once the moving party has made this showing, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable issue of fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). In deciding a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

STATEMENT OF FACTS

The following factual account is set forth in accordance with the above standard. In the early hours of February 1, 1991, Officers Larry J. Stovall ("Stovall") and

Thomas E. Redd ("Redd") of the South Boston Police Department pulled over Jerry Lowery ("Lowery") pursuant to a "routine" traffic stop. The events which occurred before and during the traffic stop are unclear as Lowery's suffered serious injuries during the stop which affected his memory. Unfortunately, Lowery was shot in the head by Officer Stovall during the traffic stop in what turned out to be an extraordinary occurrence. As Lowery is unable to recall specific details of the events preceding his shooting, the factual accounts of both the plaintiff and the Defendants are set forth below in the light most favorable to the non-moving party.

(1) Lowery's Statement of the Facts.

On Thursday evening, January 31, 1991, plaintiff left his residence in South Boston between 7:00 and 8:00 p.m. At approximately 1:00 a.m., Officer Redd, while on patrol, first spotted Lowery's car in the western part of the

City. Shortly thereafter, Lowery's car was again spotted stopped at an unlighted house on Webster Street, and Officer Redd saw Lowery walking from the back of the house to the front porch of the house. Officer Redd stopped and exited his patrol car and asked Lowery why he had been behind the unlighted house. Lowery told Officer Redd that he was lost and that he was from Richmond. Lowery was permitted to drive his vehicle away. Officer Redd returned to the patrol car and shortly later radioed Lowery's information to the police dispatcher. The dispatcher informed Officers Redd and Stovall that Lowery was driving on a suspended driver's license and that lowery's car was registered in Richmond, Virginia. Officers Redd then started to search for Lowery's car in South Boston. Officer Redd located Lowery's vehicle at 1:30 a.m. in the vicinity of the Willow Oaks Apartments. Officer Redd approached Lowery's parked car and asked

Lowery for his driver's license which, according to Lowery, he presented to Redd from his wallet while Lowery was standing outside of his vehicle. Officer Redd informed Lowery that he was driving on a suspended license and asked Lowery to accompany him to the patrol car. At the same time Officer Redd called Officer Stovall over to the patrol car, and Officer Stovall sat in the back seat of the patrol car. Lowery accompanied Officer Redd to the patrol car where Lowery sat in the front seat while Redd was issuing Lowery a summons and checking the reason why Lowery's license had been suspended.

Thereafter, Officer Redd asked Lowery to show him the contents of his pocket. Lowery consented and exited the car to show Redd what was in his pockets. While Lowery was standing outside the car, holding the contents of his pockets in his hands, Officer Redd remained in the driver's seat waiting for the reason why Lowery's license

was suspended. Lowery asserts that Officer Stovall got out of back seat of the patrol car "charged him" and shot him in the side of the head from a distance of approximately an arm's reach. Lowery maintains that he was unarmed and did not strike or attempt to strike either of the officers before the shooting. Lowery went down on one knee outside the patrol car. Lowery began crawling to the patrol car, when both officers Redd and Stovall tackled Lowery preventing him from getting inside the patrol car. During this struggle, Lowery scratched officer Redd in the face with his fingernail.

Lowery denies being in the possession of a key holder which the defendants allege was used to cut Officer Redd and which contained a quantity of cocaine. Defendants also allege Lowery had a passenger in his car but Lowery denies this.

Lowery was taken to the Halifax-South Boston

Community Hospital for emergency treatment. later, Lowery was charged with operation a motor vehicle with a revoked license, possession with the intent to distribute cocaine, and with maliciously wounding and causing bodily harm to Redd. Lowery's criminal charges were dropped by the Halifax County Circuit Court because the court found that Lowery wa snot mentally competent to assist his council or to stand trial. On January 30, 1992 Lowery brought this action against the Municipal Defendants.

(2) Officers Redd and Stovall's Statement of the Facts

Officers Redd and Officer Stovall's version of what occurred in the early morning hours of February 1, 1990 is quite different and diametrically opposed Lowery's version of the facts. Officers Redd and Stovall maintain that Lowery was driving into the Willow Oaks Apartments when Officer Redd pulled over Lowery. Officer Redd

approached the drivers side of Lowery's car, and asked for Lowery's operator's licenses. Officer Redd informed Lowery that he was driving under a suspended license. Lowery became agitated and began cussing; shortly thereafter, Officer Redd asked Lowery to return to his patrol car so he could issue Lowery a summons. While Officer Redd and Lowery were waling toward the patrol car, a unknown female exited Lowery's vehicle and ran away carrying something in her hand. Lowery demanded to know why his license had been suspended, and Officer Redd radioed the dispatcher to inquire as to the reasons. Lowery was seated in the front passenger seat of the patrol car; Officer Redd was seated in the driver seat of the patrol car. Lowery appeared nervous and getting in and out of the patrol car. Officer Redd asked Officer Stovall to join him in the patrol car. Officer Stovall then sat in the back seat of the patrol car; there was no divided between the seats.

Without warning Lowery became violent in the front seat of the police car and attacked Officer Redd by slashing him across the face and neck with a sharp object. Officer Redd screamed "Knife," and Officer Stovall attempted to retain Lowery by reaching over the seat with both hands and grabbing Lowery's shoulders. Since Officer Stovall's efforts were unsuccessful, he grabbed Lowery by the back shirt collar with his left hand and punched Lowery in the base of his skull with "as much force as possible.[1]" Lowery was unfazed by the officers attempts to control Lowery as Lowery possessed abnormal strength in the patrol car. Lowery turned and started to climb over the seat and attempted to attack Stovall with the object; however, Stovall deflected Lowery's attack, unsnapped his holster, drew his revolver, and shot Lowery in his left

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[1] Officer Stovall was a heavyweight boxer when he was in the Marine Corps and compiled a 38-2 boxing record.

temple. After the shooting, no knife was found at the scene -- only a black plastic magnetic key holder approximately three inches long and one inch wide.

(3) Miscellaneous Facts

All the City of South Boston Police Officers received their basic training at the Virginia Criminal Justice Academy (the "Academy") in Lynchburg, Virginia. In addition to basic training, officers receive annual in-service training given or sponsored by the Academy. All officers are issued mace, but Officer Stovall decided not to carry it on February 1, 1991. Officer Stovall has been a police officer with the South Boston Police Department for approximately 11 years prior to the February 11, 1991 shooting of Lowery. Prior to becoming a member of the South Boston Police Department, Stovall was a member of the Halifax Police Department for less than one year. The South Boston Police department has received various

complaints from citizens concerning Officer Stovall; however, only one of these complaints could even arguably be related to Officer Stovall excessive use of force, and it occurred in July of 1985.

Lowery has also obtained a sworn witness statement from two South Boston residents who were listening to police radio transmissions in the early morning hours on February 1, 1991 and overheard conversation between South Boston Police officer related to the Lowery shooting.

DISCUSSION

I. Sections 1983 & 1985 - Qualified Immunity against Officer Redd and Officer Stovall

The basic principles of qualified immunity are well settled, and a recent decision of the Fourth Circuit governs the instant motion and clearly explains the basic purpose of qualified immunity. See Rainey v. Conerly, No. 91-7248, No. 91-7249 (4th Cir. Aug. 19, 1992). Police officers in

performing their duties, are accorded latitude in exercising what are inescapably discretionary functions replete with "judgment calls." See Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). Fourth Amended law as to deadly force was well-established at the time of Officer's Stovall's shooting of Lowery on February 1, 1991 as the Supreme Court had concluded that deadly force may be used "where the officer has probably cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Tennessee v. Garner, 471 U.S. 1, 11, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985). It also was established that every person has the right not to be subjected to unreasonably or excessive force while being arrested or detained by a police officer. Graham v. Connor, 490 U.S. 386 (1989). In Graham the Supreme Court stated:

> The 'reasonableness' of a particular use of force must be judge from the perspective of a reasonable officer on the scene rather than

> the 20/20 vision of hindsight . . . . [and] the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

490 U.S. at 396-97.

Defendants' reliance on Gooden v. Howard County, MD, 954 F.2d 960 (4th Cir. 1992) is misplaced. Rainey v. Conerly, No. 91-7248, No. 91-7249 (4th Cir. Aug. 19, 1992), limited the Gooden holding to those situations where there is no credibility issue as to the underlying operative facts. In Rainey the plaintiff was a pretrial detainee who brought a section 1983 action against a prison guard for alleged excessive use of force while being transported from his cell block to the prisoner visitation area. The alleged excessive use of force was the guard's act of dragging Rainey into a jail corridor and slamming him into a wall three ties, thereby causing injuries to Rainey's back. In

defense of his actions, the guard asserted qualified immunity and contended that the amount of force used was necessary to diffuse a volatile situation presented by a large crow of inmates congregating by an unlocked inner cell door that could only be locked by re-entering the vestibule. The guard also argued that he only fell against Rainey when they re-entered the corridor. Id. The Fourth Circuit stated:

> Unlike Gooden where what actually happened did not need to be resolved by the trier of fact in order to reach a decision on the applicability of qualified immunity, in this case a determination of what actually happened is absolutely necessary to decide whether Conerly could reasonably have believe that his action were lawful. Conerly does not claim, as did the officers in Gooden, that he operated under a mistaken, but reasonably, perception of the facts. Instead, the crux of the dispute resolves entirely around the level of force utilized by Conerly in removing Rainey from the vestibule. If Rainey's version of the facts is credited, then Conerly's actions could not, by any reasonable officer, be considered to be within the bounds of the law. Conversely, if Conerly's version is believed,

> then, not only would qualified immunity be applicable, but Rainey would have no valid claim for use of excessive force. The determination of what actually happened depends exclusively on an assessment of the credibility of the respective witnesses. This assessment is a disputed issue of fact and, therefore, cannot be resolved on summary judgment or directed verdict. Crediting Rainey's version of the facts, as we are required to do in this context, we must find that the district court was correct in declining to grant Conerly's motion.

Id. at 5-6 (slip op.)

The evidentiary situation in the instant case is analogous to that in Rainey. The parties present conflicting, irreconcilable accounts of the February 1, 1991 incident and any determination as to the reasonableness of the use of deadly force against Lowery necessarily depends upon an acceptance of one account over the other. On a summary judgment motion, the credibility of conflicting testimony is not an issue to be decided by this court. Summerlin v. Edgar, 809 F.2d 1034, 1039 (4th Cir. 1987).

Officer Stovall failed to meet his burden of showing that there is no genuine issue of material fact as to Lowery's § 1983 and 1985 claims against him. There fore, i must deny Officer Stovall's motion for summary judgment on Lowery's section 1983 and 1985 claims. Viewing the evidence in the light most favorable to the non-moving party, I must also deny Officer Redd's motion for summary judgment at this time since it has been impossible to take Officer Redd's deposition due to his unanticipated medical condition. I will reconsider Officer Redd motion after his deposition can be taken.

II. Section 1983 claims against the City of South Boston and Chief Simmons

(1) City of South Boston

An essential element of a section 1983 plaintiff's claim against a municipality is that the denial of plaintiff's constitutional rights be caused by and official policy or

custom of the municipality. A failure to properly train or supervise police officers may satisfy this requirement if that failure is so severe as to constitute "gross negligence" or "deliberate indifference" to plaintiffs constitutional rights. City of Canton v. Harris, 489 U.S. 378 (1989). In determining whether a deficiency in training constitutes a municipal "policy" of deliberate indifference, a court muse look at "the adequacy of the training program in relation to the tasks the particular officers must perform." Id. at 109 S.Ct. 1205-6. In Canton, the Supreme Court further held that a municipality's failure to train or supervise must be **"closely related to the ultimate injury"** to the extent that one can say that the "injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." Id. at 391. (emphasis added). According the Supreme Court, it will not "suffice to prove that an injury or accident could have been avoided

if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." 489 U.S. at 391, 109 S.Ct. at 1206.

There is no evidence that the defendants made a "deliberate" or "conscious" choice not to train the police officers in this respect, knowing that their failure to do so would "likely...result in the violation of constitutional rights." Id. 489 U.S. at 390, 109 S.Ct. at 1205[2]. Given Lowery's version of the facts, no amount of training could have prevented the unprovoked shooting of Lowery by Officer Stovall. Therefore, I grant the City of South Boston's motion for summary judgment on the section 1983 claim.

---

[2]See also Collins v. City of Harker Heights, ____ U.S. ____; 112 S.Ct. 1061; 117 L.Ed2d 261 (1992) where, on a substantive due process violation claim, the court dismissed a complaint that allege the city was deliberately indifferent to decedents safety by failure to train him, as not stating a cause of action.

(2) Chief Simmons

In order for Lowery to hold Chief Simmons liable under section 1983, he has to show the same degree of culpability as Lowery has to show for the City of South Boston, i.e. "deliberate indifference" to the plaintiff's constitutional rights. Harris 489 U.S. at 390, 109 S.Ct. at 1205. The Fourth Circuit has held that liability can be established when a defendant is personally involved in the unconstitutional conduct. Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977). Moreover, the Fourth Circuit has held that in order to hold a supervisor liable, the supervisor must have known of the need for him to act to put a halt to the alleged unconstitutional conduct or conditions. Withers v. Levine, 615 F.2d 158 (4th Cir. 1980), cert. denied, Withers v. Levine, 449 U.S. 849, 66 L.Ed.2d 59, 101 S.Ct. 136 (1980).

Even if Lowery was able to show that an individual

officer violated his "constitutional rights on one occasion, that is not sufficient to raise an issue of fact whether adequate training and procedures were provided." Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980)(quoting McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979). The Tenth Circuit has recognized, however, that there are certain circumstances whereby an isolated incident of police misconduct can render a city liable under section 1983, as in the situation where there is direct evidence that the police officer involved had received no training whatsoever. Rock v. McCoy, 763 F.2d 394, 398 (10th Cir. 1985). Unlike the city in Rock, the City of South Boston did provide extensive training for all its officers including Redd and Stovall. All the City of South Boston Police Officers receive their basic training at the Virginia Criminal Justice Academy (the "Academy") in Lynchburg, Virginia. In addition to basic training, officers receive

annual in-service training given or sponsored by the Academy.

Lowery relies on the affidavit of his police expert, D.P. Van Blaricom, to show the various deficiencies in the South Boston police department, including, but not limited to the following: (1) no ongoing training provided on use of force after basic training, an (2) no training in the use-of-force decisions by the United States Supreme Court. Unfortunately, these deficiencies do not rise the to stringent requirement as set forth by the Supreme Court in Harris. Therefore, I must grant Police Chief Simmons motion for summary judgment on the section 1983 claim.

III. State Claims

Invoking the doctrine of sovereign immunity, the City of South Boston and Chief Simmons have also moved for summary judgment on the state law claims. Because I have found that the section 1983 claims against the City and

Chief Simmons must be dismissed, there is no other ground of federal jurisdiction over these defendants. Therefore, under the dictates of United Mine Workers v. Gibbs, 383 U.S. 715 (1966), I will dismiss without prejudice the state law claims.

/s/ Jackson L. Kiser

United States District Judge

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JERRY LOWERY,

Plaintiff,

v. Civil Action No. 92-CV-0004-D

CITY OF SOUTH BOSTON, VA

LARRY J. STOVALL, individually and
in his official capacity as a
police officer,

T.E. REDD, individually and
in his official capacity as a
police officer,

and

J.V. SIMMONS, individually and
in his official capacity as a
police officer,

Defendants.

AFFIDAVIT OF J.V. SIMMONS

PERSONALLY APPEARED before the undersigned

officer duly authorized to administer oaths in the Commonwealth of Virginia, J.V. Simmons, who, after first being duly sworn, deposes and says:

1. South Boston is an incorporated city of 5 square miles.

2. As of February 1, 1991, South Boston employed one police chief and 15 officers.

3. On February 1, 1991, I was Police Chief for the City of South Boston. I was hired as a Police Officer in 1957, and have been Police Chief since June 4, 1990.

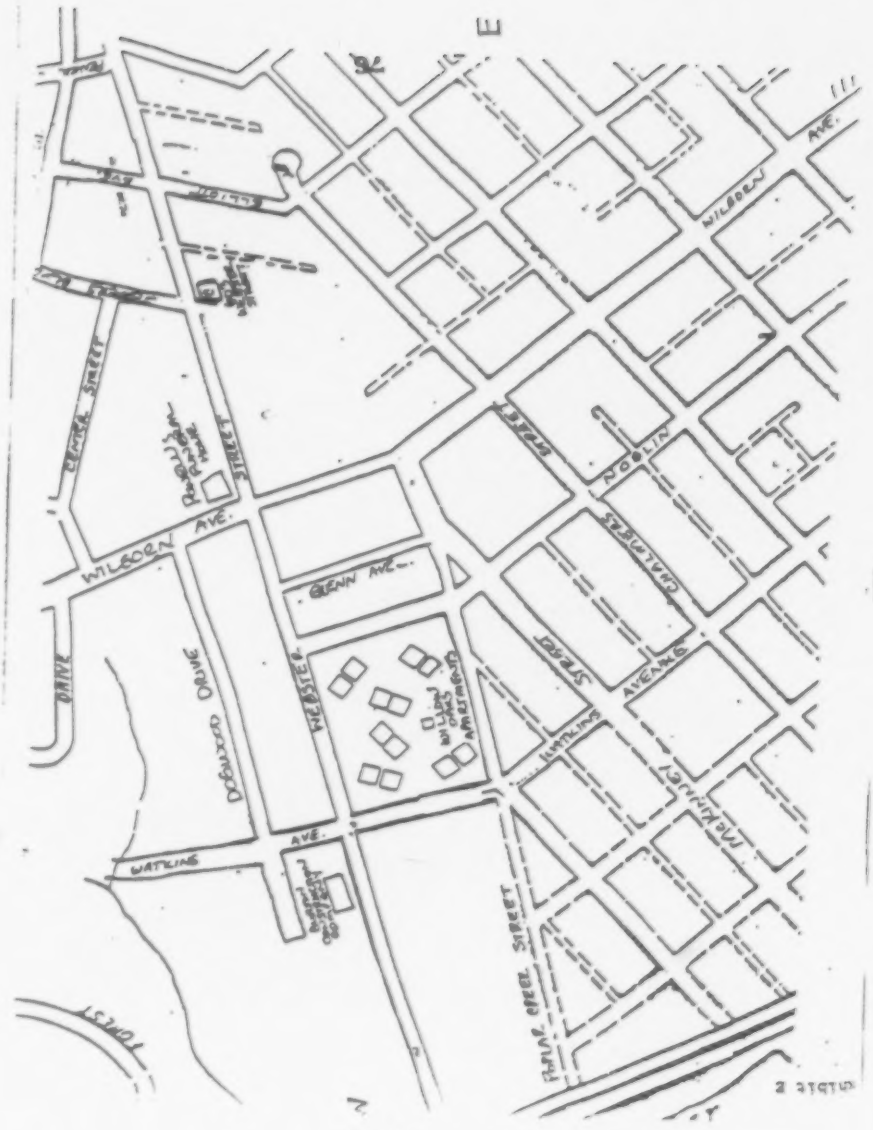
4. For the normal evening shift (12:00 Midnight - 8:00 a.m.), three officers are on patrol duty, including the officer in charge.

5. I am not aware of any previous incidents involving the shooting of a person by a police officer in South Boston.

6. Officers Stovall and Redd have not had

previous complaints about their use of a firearm or other excessive force.

7. Officers Stovall and Redd had the same police training as the other officers in South Boston. This training included proper handling of fire arms, self-defense techniques, and techniques to subdue suspects.



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